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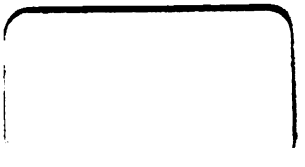

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# A TREATISE

ON THE

# LAW OF WARRANTIES

IN THE

# SALE OF CHATTELS.

BY

ARTHUR BIDDLE,

ONE OF THE AUTHORS OF A TREATISE ON THE LAW OF STOCK BROKERS.

---

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RICHARD COXE McMURTRIE,

OF THE PHILADELPHIA BAR,

THIS BOOK IS RESPECTFULLY INSCRIBED,

IN TESTIMONY OF HIS DISTINGUISHED ABILITIES, LEARNING,
AND ACCURACY AS A LAWYER,

BY THE AUTHOR.

# PREFACE.

WARRANTIES have been excellently treated in various books on Sales and Contracts, so far as the general scope of those subjects would permit; but it is believed that hitherto no work has been exclusively devoted to the subject of warranties in the sales of personal property. Owing to the vast number of principles necessarily embraced and discussed in a book on sales, the author humbly thinks that the treatment of the contract of warranty has necessarily been somewhat restricted and inadequate to the importance which the subject demands. He has therefore ventured to place in the hands of the profession this volume on warranties in the sales of chattels.

ARTHUR BIDDLE,
334 WALNUT STREET, PHILADELPHIA.

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# WARRANTIES IN THE SALE OF CHATTELS.

## CHAPTER I.

### INTRODUCTORY REMARKS ON THE NATURE OF WARRANTIES.


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Express warranty defined, § 2.
Implied warranty defined, § 3.
A warranty is not a necessary element in a contract of sale, § 4.
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Conditions of existence, or identity, not warranties, § 4.
In the absence of a warranty, the rule is *caveat emptor*, § 5.
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*Caveat emptor* does not apply where the seller is guilty of deceit, § 7.
Division of subject, § 8.


§ 1. A WARRANTY is an express or implied statement of something with respect to the article sold, which the seller undertakes shall be part of a contract of sale; and though part of the contract, yet collateral to the express object of it.[1]

§ 2. It is express, where the seller makes some positive representation or affirmation, with respect to the article to be sold, pending the treaty of sale,

[1] Per Lord Abinger in Chanter *v.* Hopkins, 4 M. & W. 404; and in Stucley *v.* Bailey, 1 H. & C. 415, Martin, B., said this was the best definition of a warranty.

upon which it is intended that the buyer shall rely in making his purchase. An example of an express warranty is had in Wood *v.* Smith,[1] where, upon the sale of a mare, the defendant, knowing the animal to be unsound, remarked to the plaintiff, "I believe the mare to be sound, but I will not warrant her;" and in an action for breach of warranty, it was objected by defendant's counsel that the action was wrongly brought in contract, and that it should have been brought in tort on the deceit. But Lord Tenterden ruled, that this being a representation made at the time of sale, that the mare was sound to the best of the vendor's knowledge, was part of the contract; and the plaintiff had a verdict, which the court afterwards refused to disturb. Another illustration is the case of Morrill *v.* Wallace,[2] in which plaintiff purchased a lot of "lean pork," inquiring at the same time whether it was good, as there appeared to be some unfavorable appearances in it, and defendant stated that it was good, not being at the time aware that it was tainted, as it in fact turned out to be. The judge instructed the jury that this constituted a warranty, and a majority of the court

[1] 5 M. & R., 124; 4 C. & P., 45; see McFarland *v.* Newman, 9 Watts (Pa.), 56, in which this case appears not to have been understood.

[2] 9 N. H., 111.

on appeal thought a verdict for the plaintiff could be supported, though a new trial was granted, as the judge who tried the case thought, under the circumstances, it should have been left to the jury to find whether, under the evidence given, this was intended as a warranty or expression of opinion only.[1]

§ 3. A warranty is implied where, from the circumstances surrounding the parties at the time of the sale, or from the nature of the thing sold, the law assumes it to be just that the buyer should be protected, in addition to the contract of sale, by a further implied contract or guarantee on the part of the vendor, and so raises by implication a warranty on the seller's part. There are several warranties that are implied by law, and their general nature is substantially perceived in the summary by Clayton, J., as follows: in Otts *v.* Alderson[2] "implied warranties have been ranged under five distinct classes: 1st, a warranty is implied that a seller has title. 2d, that the articles are merchantable, when from their nature or situation at the time of the sale an examination is impracticable. This rule is most frequently brought into requisition where the seller is the manufacturer. 3d,

[1] See also Southard *v.* Haywood, 32 Leg. Int. (Phila.) 4.

[2] 10 S. & M. (Miss.), 476, per Clayton, J., at page 481; see, also, the remarks of Mellor, J., in Jones *v.* Just, L. R. 3 Q. B. 197.

upon an executory contract to manufacture an article, or to furnish it for a particular purpose, a warranty will be implied that it is reasonably fit and proper for such purpose and use, as far as an article of such kind can be. 4th, a warranty is implied against all latent defects in two cases: I. where the seller knew the buyer did not rely on his own judgment, but on that of the seller, who knew or might have known the existence of the defects; and II. where a manufacturer or producer undertakes to furnish articles of his manufacture or produce in answer to an order. 5th, that goods sold by sample correspond with the sample in quality."

§ 4. Though it is extremely common to find some kind of warranty included in a sale, a warranty does not, therefore, constitute an essential element of the contract, but the sale is complete without it.[1] In McFarland *v.* Newman,[2] Gibson, C. J., in speaking of this subject, said: "A sale is a contract executed, on which, of course, no action can be directly founded; but an action may be founded directly on a warranty, and it was doubted in Stuart *v.* Wilkins[3] whether an action could be maintained for a breach of it in any other way; consequently, though it is a concomitant, it

[1] Chanter *v.* Hopkins, 4 M. & W. 399.

[2] 9 Watts (Pa.), 57. [3] Douglass, 18.

is also a collateral, self-existent contract, and no more a part of the sale than a covenant in a deed is a part of the conveyance;" and in Dorr *v.* Fisher,[1] Shaw, C. J., remarked that "A warranty is a separate, independent, collateral stipulation on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase-money in the vendor. And, notwithstanding such warranty or any breach of it, the vendee may hold the goods, and have a remedy for his damages by action." It is true that conditions and warranties, which are often somewhat difficult to distinguish, have been at times confounded; and, for example, the implied conditions precedent of existence, and identity or genuineness in a sale by description, which are always necessarily present in an executory contract of sale, have been called warranties, and warranties thus made essential elements of the sale; but it is very clear, and this will be hereafter spoken of more at length, that these conditions, like all others, are not warranties at all, and that the failure to carefully dis-

[1] 1 Cush. (Mass.), 273.

tinguish the two has caused great confusion in the law.[1]

§ 5. It follows, then, since a warranty is not implied by the mere fact of a sale, but is a self-existent contract, and collateral to the sale, that, in the absence of an express or implied warranty, the purchaser takes upon himself the risk of the quality of the goods he buys; and this principle of the common law is generally expressed by the maxim of *caveat emptor*.[2] This was early put thus by Fitzherbert, in the Natura Brevium, at page

[1] See remarks of Lord Abinger in Chanter *v.* Hopkins, 4 M. & W. 399; of Wright, J., in Reed *v.* Randall, 29 N. Y. 358, and of Ellsworth, J., in Terry *v.* Bissell, 26 Con. 31.

[2] Chandelor *v.* Lopus, Cro. Jac. 4; Parkinson *v.* Lee, 2 East, 314; Hall *v.* Conder, 2 C. B. N. S. 22; Hopkins *v.* Tanqueray, 15 C. B. 130; Ormrod *v.* Huth, 14 M. & W. 664; Sprigwell *v.* Allen, Aleyn, 91; Carley *v.* Wilkins, 6 Barb. (N. Y.) 557; Seixas *v.* Woods, 2 Caines (N. Y.), 48; Wilbur *v.* Cartright, 44 Barb. (N. Y.) 536; Moses *v.* Mead, 1 Denio (N. Y.), 378; Dean *v.* Mason, 4 Conn. 428; Crary *v.* Hoffman, 2 W. N. C. (Phila.) 16; Frazier *v.* Harvey, 34 Conn. 469; Lord *v.* Grow, 39 Pa. St. 88; Holden *v.* Dakin, 4 John. (N. Y.) 421; Hadley *v.* Clinton, 13 Ohio St. 502; Hahn *v.* Doolittle, 18 Wisc. 196; Irving *v.* Thomas, 18 Me. 418; Johnston *v.* Cope, 3 H. & J. (Md.) 89; Mixer *v.* Coburn, 11 Metc. (Mass.) 559; Salem Rubber Co. *v.* Adams, 23 Pick. (Mass.) 256; Winsor *v.* Lombard, 18 Pick. (Mass.) 60; Tewkesbury *v.* Bennett, 31 Iowa, 83; Otts *v.* Alderson, 10 S. & M. (Miss.) 476; Westmoreland *v.* Dixon, 4 Hayw. (Tenn.) 223; Bryant *v.* Pender, 45 Vt. 487. See *infra*, § 142.

213 (7th edition): "If a man do sell unto another man a horse, and warrant him to be sound and good, etc., if the horse be lame or diseased, that he cannot walk, he shall have an action upon the case against him. And so if a man bargain and sell unto another certain pipes of wine, and warrant them to be good, etc., and they are corrupted, he shall have an action upon the case against him. But note: It behoveth that he warrant it to be good, and the horse to be sound, otherwise the action will not lie. For if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges in the case; 26 H. VI. 35. But if a smith prick my horse with a nail, etc., I shall have my action upon the case against him, without any warranty by the smith to do it well; for it is the duty of every artificer to exercise his art rightly and truly as he ought."

§ 6. It may, however, be observed that the courts in South Carolina seem to have adopted the doctrine of the civil law upon this subject, and in that State the rule "*caveat venditor*" seems to prevail.[1]

[1] Timrod *v.* Shoolbred, 1 Bay (S. C.), 324; Barnard *v.* Yates, 1 N. & Mc. (S. C.) 142. See in this case the lengthy opinion of Judge Gantt, in support of the doctrine of the civil law.

§ 7. Where the seller is guilty of any fraudulent concealment in respect to the quality of the goods he sells, another principle of law is then invoked, and, as will hereafter more fully appear, the rule of *caveat emptor* does not apply.[1]

§ 8. Having thus made these few preliminary remarks with respect to the nature of the contract of warranty in general, I shall treat the subject more particularly with reference, *first*, to express warranties; *secondly*, to implied conditions; *thirdly*, to implied warranties; and *fourthly*, to the remedies of the parties, and the measure of damage.

[1] Barnard *v.* Kellogg, 10 Wall. (U. S.) 383. See *infra*, Chap. V., head, Fraud.

# CHAPTER II.

## EXPRESS WARRANTIES.

SECTION I. THE PARTIES TO THE CONTRACT; PRINCIPAL AND AGENT.

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II. *Principal and Agent.*

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In this chapter I shall consider the law relative to the parties to the contract, and then the contract itself.

## Section I. The Parties to the Contract.

### I. *The Principal Parties.*

§ 9. Any one having the legal status necessary to make a contract of sale, it is presumed may also make a contract of warranty, and for the legal qualifications of a party to a contract of sale the reader is referred to the excellent works of Mr. Benjamin on Sales, and Dr. Wharton on Contracts. But the contract of warranty is frequently given by an agent, as well as the principal, and the authority of the agent to warrant may be either express or implied. Where it is express, no questions peculiarly relating to the subject of warranty are likely to arise, but this express contract will be construed like any other kind of express contract of agency, and will be more appropriately discussed in some treatise on agency. But in the case of the agent's implied authority to warrant, the question

of the law of warranty is more nearly concerned, and I shall review the authorities on this point, together with one or two other cases that have arisen, in respect to the question of agencies in connection with that of warranty.

## II. *Principal and Agent.*

### *a. Creation of the Agent's authority to warrant by implication.*

§ 10. The question has frequently arisen whether an agent, authorized to sell and deliver goods, is thereby also impliedly empowered to give the collateral contract of warranty, in addition to making the principal contract of sale. The authorities on the subject are, perhaps, at the first blush, somewhat difficult to reconcile; but I think, after a careful consideration, a certain rule of law may be extracted from the numerous English and American decisions that have been rendered on the point.

§ 11. In Fenn *v.* Harrison[1] [1790] it appeared that defendants had directed their agent to cash or discount a bill of exchange in the market, but stated *they would not endorse it;* and it was held that the agent could not bind the defendants to pay the bill. On the second trial of the case,[2] the *only* di-

[1] 3 T. R., 757. [2] 4 T. R., 177.

rection of the defendants appeared to be, that the agent should *discount the bill;* and it was held the agent could bind the principal by endorsement; the principle of the decision being that the direction to get the bill discounted, meant the transfer of the bill for cash, and that the usual method was either by mere delivery or endorsement; consequently, if the agent cashed the bill by endorsement, his principals were bound, as that came within the scope of the direction to discount, or cash the bill, which, in the first trial, had appeared to be restricted by the refusal of the defendants to endorse; which, however, had not appeared on the second trial. Ashhurst, J., on the first trial of the case, made some remarks with respect to the different rules of law applicable, where there was a private direction by a master, to the case of a general and special agent, saying: "I take the distinction to be that if a person keeping livery stables, and having a horse to sell, directed his servant not to warrant him, and the servant did nevertheless warrant him, still the master would be liable on the warranty, because the servant was acting within the general scope of his authority, and the public cannot be supposed to be cognizant of any private conversation between master and servant; but if the owner of a horse were to send a stranger to a fair, with express directions not to

warrant the horse, and the latter acted contrary to orders, the purchaser could only have recourse to the person who actually sold the horse, and the owner would not be liable on the warranty, because the servant was not acting within the scope of his employment."

§ 12. In Helyear *v.* Hawke[1] [1803], a horse was sold by the defendant's groom at Tattersal's, and no warranty was shown in the case, but Lord Ellenborough remarked: "I think the master having intrusted the servant to sell, he is intrusted to to do all he can to effectuate the sale, and if he does not exceed his authority in so doing he binds his master."

§ 13. This was followed by the much quoted case of Alexander *v.* Gibson[2] [1811]. There it was decided that a servant, sent to sell a horse at a fair, was authorized to give a warranty of soundness, because, as Lord Ellenborough said: "It is now most usual, on the sale of horses, to require a warranty, and the agent who is employed to sell, when he warrants the horse, may fairly be presumed to be acting within the scope of his authority."

§ 14. Then came the well-known case of Brady *v.* Todd,[3] containing an able statement of the law upon this point. Here the defendant, a potato

[1] 5 Esp., 72.
[2] 2 Camp., 555.
[3] 9 C. B. N. S., 591.

salesman in London, owning a farm in Essex, which was under the care of a bailiff, had recently purchased a horse, and sent it to his farm. A friend of the plaintiff on the lookout for a horse for him, hearing of this, appealed to the defendant for the purchase; whereupon the bailiff was sent with the horse to the plaintiff, and authorized to sell the animal for not less than thirty guineas. The jury found that no express authority had been given to the bailiff to make a warranty, but that the latter had warranted the horse. On the argument, the counsel for the defendant insisted that no authority to warrant could be implied from the authority to sell; stating that Helyear *v.* Hawke[1] and Alexander *v.* Gibson[2] were of doubtful authority, and remarked, that on Fenn *v.* Harrison[3] being quoted in Bank of Scotland *v.* Anderson,[4] Lord Eldon had said: "If Justice Buller had a horse to sell, and thought he would be bound by the warranty of his servant, though desired not to warrant, he would have gone to market himself to see his horse sold. But the judges appeared to have made a distinction between horse dealers and others. If Tattersal sent his servant to sell, and the servant, contrary to his instructions, warranted, Tattersal might be bound; but another

[1] *Supra.* [2] *Supra.* [3] *Supra.*
[4] 1 Dow. P. C., 40, 44.

person (not a horse dealer) would not be bound by the unauthorized warranty." Erle, C. J., in delivering the opinion of the Court, observed that the point had never been decided, though often mentioned by judges and text writers. "The general rule, that the act of an agent does not bind his principal unless it was within the authority given to him is clear. But the plaintiff contended that the circumstances created an authority in the agent to warrant on various grounds. Among others, he referred to cases where the agent has by law a general authority to bind his principal, though as between themselves there was no such authority, such as partners, masters of ships, and the managers of trading business; and stress was laid on the expressions of several judges, that the servant of a horse dealer or livery stable keeper can bind his master by a warranty, though, as between themselves, there was an order not to warrant; see Helyear *v.* Hawke,[1] Alexander *v.* Gibson,[2] Fenn *v.* Harrison.[3] We understand those judges to refer to a general agent employed by a principal to carry on his business, that is, the business of horse dealing; in which case there would be by law the authority here contended for. But the facts of the present case do not bring the defendant with-

[1] 5 Esp., 72. [2] 2 Camp., 555. [3] 3 T. R., 757.

in this rule, as he was not shown to carry on any trade of dealing in horses. It was also contended that a special agent, without any express authority, in fact, might have an authority, by law, to bind his principal; as, where the principal holds out that the agent has such authority, and induces a party to deal with him on the faith that it is so. In such a case the principal is concluded from denying this authority, as against the party who believed what was held out, and acted on it; see Pickering *v.* Busk.[1] But the facts do not bring the defendant within this rule. The main reliance was on the argument that an authority to sell is by implication an authority to do all that in the usual course of selling is required to complete a sale; and, that the question of warranty is in the usual course of a sale required to be answered, and that, therefore, the defendant by implication gave to G. (the bailiff) an authority to answer that question, and to bind him by his answer. It was a part of this argument, that an agent, authorized to sell and deliver a horse, is held out to the buyer as having authority to warrant. But on this point, also, the plaintiff has, in our judgment, failed. We are aware that the question of warranty frequently arises upon the sale of horses; but we are also aware that sales may be made

[1] 15 East, 38.

without any warranty or even an inquiry about warranty. If we laid down for the first time that the servant of a private owner intrusted to sell and deliver a horse on one particular occasion is, therefore, by law authorized to bind his master by a warranty, we should establish a precedent of dangerous consequence; for the liability created by a warranty extending to unknown as well as known defects, is greater than is expected by persons inexperienced in law; and, as everything said by the seller in the bargaining may be evidence of warranty to the effect of what he said, an unguarded conversation with an illiterate man sent to deliver a horse may be found to have created a liability which would be a surprise equally to the servant and the master. We, therefore, hold that the buyer taking a warranty from such an agent as was employed in this case, takes it at the risk of being able to prove that he had the principal's authority; and if there was no authority in fact, the law from the circumstances does not, in our opinion, create it. When the facts raise the question it will be time enough to decide the liability created by such a servant: as a foreman, alleged to be a general agent, or such a special agent as a person intrusted with the sale of a horse in a fair or other public mart, where stranger meets stranger, and the usual course of business is for the person

in possession of the horse, and appearing to be the owner, to have all the powers of an owner in respect of the sale. The authority may, under such circumstances as are last referred to, be implied, though the circumstances of the present case do not create the same inference."

§ 15. The following principle may then be deduced from the preceding case, namely:—

The general rule, that an agent authorized to sell and deliver a chattel can do whatever is usual and necessary to effectuate the sale or object of his agency; and if it be usual in the business in which he is employed to warrant the article he sells, he may bind his principal by a warranty; otherwise, not. And from this general rule the following corollaries do, and have been decided to, follow:—

1. That, sales frequently being made without a warranty, or even inquiry of warranty, a naked authority to sell and deliver does not necessarily imply the authority to warrant.

2. That there is a distinction between the power of a general agent employed to carry on a business by his employer and that of a special agent; and that authority to the former to sell might carry along with it the power to warrant, if it was usual to give a warranty when making a sale in such business.

3. That a special agent held out by his principal to have such authority, and inducing people thereby to deal with him, can bind his principal by a warranty, in favor of innocent parties who have acted on his supposed authority.

4. *Semble*, that a *dealer* in horses would be bound by the warranty of a special agent employed to sell a horse.

5. *Quære*, whether a foreman or special agent intrusted by his employer with the sale of a horse at a fair, where stranger meets stranger, and it is usual for the person in possession to exercise all the powers of ownership, can bind his principal by a warranty?

§ 16. It will, I think, be found that the English law is generally in accordance with the principles enunciated in this case, which has been said by a very eminent lawyer to be the most authoritative exposition of the law at the present time on this point.[1]

§ 17. Thus, for example, in Pickering *v.* Busk,[2] Bayley, J., said, "If the servant of a horse dealer, *with express directions not to warrant*, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed."

[1] Mr. Benjamin in his Treatise on Sales. [2] 15 East, 45.

§ 18. And in Howard *v.* Sheward[1] the principles of Brady *v.* Todd were reaffirmed, and it was, besides, held that, evidence of a general practice amongst horse dealers not to warrant, where the horse has been examined by a veterinary surgeon and certified by him to be sound, is not admissible to rebut the inference of the agent's authority to warrant.[2]

§ 19. One of the earliest American cases upon the subject is Lane *v.* Dudley[3] [1812], in which it was said, by Taylor, C. J., citing the dictum of Ashhurst, J., in Fenn *v.* Harrison,[4] that an authority to warrant a horse is within the scope of an authority to sell. In Skinner *v.* Gunn[5] [1839], the court intimated the same thing, and cited Fenn *v.* Harrison, Helyear *v.* Hawke, and Alexander *v.* Gibson.[6] After this came Gaines *v.* McKinley,[7] Cocke *v.* Campbell,[8] and Bradford *v.* Bush,[9] approving the principles of the above decisions. It is to be remarked that these cases were on the sales of slaves and horses.

§ 20. In Herring *v.* Skaggs[10] the general reason-

[1] L. R., 2 C. P. 148.

[2] See Oliphant on Horses (3d ed.), 124; Dingle *v.* Hare, 7 C. B. N. S. 145.

[3] 2 Mur. (N. C.), 119.

[4] *Supra.*

[5] 9 Port. (Ala.), 305.

[6] *Supra.*

[7] 1 Ala., 446.

[8] 13 Ala., 286.

[9] 10 Ala., 386.

[10] 62 Ala., 180.

ing of the court, and the conclusion reached, are generally in accordance with the English rule; and the earlier Alabama cases were criticized, though their authority, as applied to their subject-matter, the sales of slaves and horses, was not disturbed. It was, in this case, decided that a general agent of *Herring's* safes was not authorized, by virtue of his authority to sell, to warrant the safes, as burglar proof; but that it was incumbent on any one relying on such warranty to show a custom of the trade to that effect. The judge, who delivered the opinion, in commenting upon the subject-matter of the earlier Alabama cases, just referred to, said: "Perhaps the custom of such warranties is so general, and has prevailed so long, that it has come to be treated as judicial knowledge. Certainly it was not intended to be affirmed that an agent with general powers of sale, has unlimited power to bind his principal, by any and every stipulation the various phases of traffic may be made to assume; . . . we are not prepared to assent to the doctrine, in the unlimited sense, that a general agent to sell has, by virtue thereof, the power to bind his principal by every species of warranty a purchaser may exact. In Benjamin on Sales, § 624, is the following language: 'Warranties are sometimes given by agents, without express authority to that effect. In such cases

the question arises as to the power of an agent, who is authorized to sell, to bind his principal by a warranty. The general rule is, as to all contracts including sales, that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale.' We fully approve and adopt this language of this very accurate writer. We do not intend, however, to overturn the doctrine declared in Skinner *v.* Gunn, and Cocke *v.* Campbell, *supra*." In Ezell *v.* Franklin[1] the authority to sell a slave was again held to include the power to warrant. In New York, in Nelson *v.* Cowing[2] [1844], these American cases were recognized, Bronson, J., saying: "But a warranty—and so of a representation—is one of the usual means for effecting the sale of a chattel; and when the owner sells by an agent, it may be presumed in the absence of all proof to the contrary, that the agent has been clothed with all the usual powers for accomplishing the proposed end; so long as the agent is acting within the general scope of his authority, persons dealing with him are considered

[1] 2 Sneed (Tenn.), 236. [2] 6 Hill (N. Y.), 336.

as dealing with the principal. I will not stop to inquire whether the agent is to be regarded as *a general* or *special* agent; for if he was only a *special* agent, his authority to warrant the quality or condition of the thing sold would be presumed until the contrary appeared." And in Tice *v.* Gallup[1] the court held that a *special* agent authorized to sell a horse might warrant it, unless expressly forbidden to do so.[2]

§ 21. In Bryant *v.* Moore,[3] however, a warranty of oxen by a special agent was held not to bind the principal; and in Croom *v.* Shaw,[4] the court seemed to favor the rule of Brady *v.* Todd, saying, "*Oliver*, in this case, seems to have acted as a *special* agent of *Croom*, and not as a *general* agent. He had, as it would appear by the evidence, a power to sell, but there is nothing to show that he had authority to warrant." The sale was of a horse, but the case went off on another point.

§ 22. In Cooley *v.* Perrine[5] [1879] the whole subject received an able treatment by Dixon, J., in the Supreme Court of New Jersey, and is probably

[1] 2 Hun (N. Y.), 446.

[2] See, also, Murray *v.* Brooks, 41 Iowa, 45; Boothby *v.* Scales, 27 Wisc. 626; Andrews *v.* Kneeland, 6 Cowen (N. Y.), 354; Palmer *v.* Hatch, 46 Mo. 585; Deming *v.* Chase, 48 Vt. 382.

[3] 26 Me., 84; see Randall *v.* Kehlor, 60 Me. 47.

[4] 1 Fla., 211.

[5] 41 N. J. L. R., 322.

the best presentation of the principles of law applicable to this point, up to this time, in the United States. The action was on a note given by the defendant for the purchase of a horse, sold by the plaintiff's agent, with a warranty of soundness; and the defence was that the horse had turned out unsound. Plaintiff was a lumber and coal merchant—in nowise a horse dealer—and had never employed his agent to sell for him before; and on this occasion, while in his sick-room, had been informed by the agent of defendant's desire to purchase, and had directed him to sell the horse for $150, but had given no authority to warrant. The horse was sold at this price, the agent affirmed the horse to be *all right*, but judgment was given for the defendant. On appeal this was reversed, Dixon, J., saying: the agent "was clearly only a *special* agent, . . . his instructions were to sell a certain horse to a designated person at a fixed price. Herein, the only term subject to any appearance of indefiniteness, was the direction to *sell*. . . . A sale of a chattel is a transfer of its title by the vendor to the vendee for the price paid or promised: 1 Parsons on Contracts, 519. A direction to sell, therefore, nothing more appearing, would confer upon a special agent no authority beyond that of agreeing with the purchaser, in regard to these component particulars. Under certain circumstances, a sale

legally imports more than these particulars, and in such cases the authority under a power to sell would be correspondingly enlarged. Thus, if a sale be made by sample, it is thereby impliedly warranted that the bulk is of as good a quality as the sample. Hence, it has been properly held, that where a broker was empowered to sell goods which were in bulk, and, by the custom of brokers, it was permissible to sell such goods by sample, and he was not restricted as to the mode of sale, his sale by sample, and the warranty of quality therein implied, was binding upon his principal: The Monte Allegre,[1] Andrews *v.* Kneeland,[2] Schuchardt *v.* Allens.[3] But in the sale of a horse, subject to the buyer's inspection, no warranty of quality is implied, and it seems a short and clear deduction of reasoning thence to conclude that in an authority to make such a sale, no authority so to warrant is implied. The warranty is outside of the sale, and he who is empowered to make the warranty must have some other power than to sell." The learned judge then reviewed Fenn *v.* Harrison, Helyear *v.* Hawke, Alexander *v.* Gibson,[4] and the New York, Tennessee, and earlier Alabama cases, above quoted, and

[1] 9 Wheat. (U. S.), 616.
[2] 6 Cowen (N. Y.), 354.
[3] 1 Wall. (U. S.), 359.
[4] *Supra.*

added: "These are the only cases I have found wherein it has been decided that an authority to a special agent to sell embraces an authority to warrant quality. Resting, as they all do, directly or indirectly on the authority of Fenn *v.* Harrison, Helyear *v.* Hawke, and Alexander *v.* Gibson,[1] they no longer have any foundation on authority, since these three cases, if they ever applied to a special agency, are now in that respect distinctly overruled by Brady *v.* Todd,[2] a decision foreshowed by Cresswell, J., when in Coleman *v.* Riches[3] [1855] he asked counsel, citing Alexander *v.* Gibson, 'would you hold that to be good law at the present day?' . . . Nor have they any better basis on principle than on authority. Their underlying principle is said to be that the agent, being empowered to sell, is intrusted with all powers proper for effectuating the sale, and a warranty is both a proper and a usual power for that purpose. If by this were meant that the agent is intrusted with all powers proper to the making of an effectual sale, its accuracy could not be questioned. . . . But if the expression mean that the agent is intrusted with all powers convenient, for the purpose of inducing the purchaser to buy, even to the extent of enabling him to make collateral contracts to that end, then

[1] *Supra.* [2] *Supra.* [3] 16 C. B., 104.

I think it is in violation of the settled rule that a special agent must be confined strictly to his express authority, and is in opposition to well-considered and authoritative decisions. . . . Undoubtedly there are many cases where it has been held that a *general* agent might warrant quality. . . . Such agencies extend, it is said, to whatever is fairly included among the dealings of that branch of business in which the agent is employed. But their scope arises, not out of the instructions given, but out of those implied powers which the law confers, even in spite of instructions, because of which, these are often called implied agencies in contradistinction from special agencies which are express. Thus, in Howard *v.* Sheward,[1] an agent of a horse *dealer* bound his master by a warranty of the quality of the horse sold, although directed not to warrant. Other cases of warranty of quality by a special agent are: Hunter *v.* Jameson,[2] Woodford *v.* McClenahan,[3] Milburn *v.* Belloni,[4] Nelson *v.* Cowing.[5] But it is utterly inadmissible to deduce from these instances of general agency, the existence of similar powers in *special* agents. . . . Nor do I see the propriety of asserting, as a matter of law, that a warranty of

[1] L. R. 2 C. P., 148.
[2] 6 Ired. (N. C.), 252.
[3] 9 Ill., 85.
[4] 34 Barb. (N. Y.), 607.
[5] 6 Hill (N. Y.), 336.

quality is a usual means of effecting the sale of a chattel by a private person, . . . or that it is even a usual attendant upon such a sale. Such warranties may be as various as the qualities of the objects sold, and to determine, as by a rule of law, which are usual and which are not, will involve the courts in discussions where the personal experience of judges must have more influence than legal principles. In every such case the question of usage should be regarded as one of fact, and not of law." This case was again appealed to the Court of Errors and Appeals,[1] and the opinion of Dixon, J., unanimously affirmed, and pronounced to be in harmony "with the rule of law on this subject, as settled in the English courts, in the case of Brady *v.* Todd,"[2] the court remarking, that it was unnecessary to explain further the grounds of their decision or discuss the cases, as this had "been done with so much clearness and force" by Justice Dixon.

§ 23. The conclusion, then, that we draw from the American decisions which have been hitherto reviewed, is, that the law as stated in Brady *v.* Todd, and Cooley *v.* Perrine, is substantially that which the American courts have held to be sound. It is true that some of the cases, upon the subject of

[1] 13 Vroom (N. J.), 623 [1880]. [2] 9 C. B. N. S., 592.

warranties of slaves and horses, in Alabama, Tennessee, and even New York, appear to conflict somewhat with the general rule of Brady *v.* Todd, and Cooley *v.* Perrine; but this is probably, as was suggested in Herring *v.* Skaggs,[1] because the custom of warranting certain chattels in certain places was so general and had prevailed so long, that it had come to be treated as judicial knowledge, and, as Lord Eldon remarked in Bank of Scotland *v.* Anderson,[2] "the judges appear to have drawn a distinction between horse dealers and others." And in accordance generally with these principles it will be found that the cases in America have been decided.

§ 24. Thus, in The Monte Allegre,[3] Thompson, J., in speaking with reference to the implied authority of an agent to warrant in a sale by sample, said, "A merchant who employs a broker to sell his goods knows, or is presumed to know, the state and condition of the article he offers for sale, and if the nature or situation of the property is such that it cannot be conveniently examined in bulk, he has a right, and it is for the convenience of trade that he should be permitted to select a portion and exhibit it as a specimen or sample of the whole; and that he should be held responsible for the truth of such representation. The broker is

[1] *Supra.* [2] *Supra.* [3] 9 Wheat. (U. S.), 644.

his special agent for this purpose, and goes into the market clothed with authority to bind his principal;" and in Schuchardt *v.* Allens,[1] the decision was in accordance with this principle. It is true that in the course of his opinion, Swayne, J., said, "*authority without restriction* to an agent to *sell, carries with it authority to warrant,*" but these words should probably be understood as referring to the subject-matter of the case, which was a sale by sample; especially, as the court referred, in support of its remarks, to two cases in which the principle of the implied authority of an agent to warrant in a sale by sample was asserted.[2]

§ 25. In Dodd *v.* Farlow,[3] it was contended that a usage, authorizing a broker to warrant the merchantability of certain goods, was admissible on the ground that, in any case, when such goods were sold and nothing said, there was an implied warranty that they were merchantable, and consequently the broker might warrant expressly if he warranted no more than would be anyhow implied. It was not, however, claimed that there existed an independent usage, giving the broker such right. But Bigelow, C. J., said, "The usage is liable to

[1] 1 Wall. (U. S.), 359, 369.

[2] Andrews *v.* Kneeland, 6 Cowen (N. Y.), 354; The Monte Allegre, 9 Wheat. (U. S.) 616.

[3] 11 Allen (Mass.), 426.

the grave objection that it is unreasonable and so contrary to the ordinary rules by which the relation of principal and agent is regulated, that it cannot be presumed to have been in contemplation of a vendor in employing a broker to make a sale of merchandise."

§ 26. In Upton *v.* Suffolk Co. Mills,[1] a general selling agent in Boston, warranted in the name of his principal that four thousand quarter barrels of flour sold by him would be of such a character as to "insure its keeping sound on a voyage to San Francisco," and it was held, that the authority of the agent to sell did not authorize his making such a hazardous warranty, that the flour should keep sound during a long sea voyage, in which it must twice cross the equator. Metcalf, J., remarked, "what is the extent of the implied authority of a general selling agent? . . . When one authorizes another to sell goods, he is presumed to authorize him to sell in the usual manner, and only in the usual manner, in which goods or things of that sort are sold.[2] The usage of the business in which a general agent is employed furnishes the rule by which his authority is measured. Hence, a general selling agent has authority to sell on

[1] 11 Cushing (Mass.), 586.

[2] Story on Agency, § 60; see Shaw *v.* Stone, 1 Cush. (Mass.) 228.

credit, and to warrant the soundness of the article sold, when such is the usage: Goodenow *v.* Tyler,[1] Alexander *v.* Gibson,[2] Nelson *v.* Cowing.[3] But as stocks and goods sent to auction are not usually sold on credit, a stock broker or auctioneer has no authority so to sell them, unless he has the owner's express direction or consent: Wiltshire *v.* Sims;[4] and it was said by Mr. Justice Thompson[5] that auctioneers have only authority to sell and not to warrant, unless especially instructed to do so. As there is no evidence nor suggestion of a usage to sell flour with the hazardous warranty that it shall keep sweet during a sea voyage, in which it must twice cross the equator, we deem it to be quite clear that nothing short of an express authority conferred on the agent would empower him to bind them by such a warranty."

§ 27. In Palmer *v.* Hatch[6] the agent instructed to sell, warranted against a seizure by the government under the revenue laws. The court, while admitting the doctrine of the agent's power under certain circumstances to warrant the quality of

[1] 7 Mass., 36. [2] *Supra.*

[3] 6 Hill (N. Y.), 336; 2 Kent Com. (6th ed.), 622; Russell on Factors, 58; Smith on Master and Servant, 128, 129.

[4] 1 Campb., 258; 3 Chit. Law of Com. & Man., 205; 1 Bell, Com., 388.

[5] 9 Wheat. (U. S.), 647. [6] 46 Mo., 585.

the article sold, said: "But the warranty counted upon in the plaintiff's petition, as we have seen, is not of that character; it extends to and assumes to warrant the plaintiffs against gratuitous and unwarrantable interferences with the subject of the sale. Such warranties, it is apprehended, are of rare occurrence. The authority of an agent to make them is not inferable from a naked general authority to sell." In Richmond, etc., Co. *v.* Farquar,[1] the court held that the authority given, by the vendor of certain sacks of wool, to one to weigh and deliver them, did not empower him to warrant as to the quality of the wool. And in Smith *v.* Tracy,[2] where an agent, employed to sell bank stock, warranted its condition, etc., to the purchaser; it was held that as there was no proof of a custom that bank stock was usually sold with a warranty, the principal was not bound by the warranty.

§ 28. It has been frequently decided that where one acts in a representative capacity, as a sheriff, auctioneer, etc., no authority to warrant will be implied.

§ 29. Thus, in The Monte Allegre[3] it was held, that in a sale by a marshal, under an order of

[1] 8 Blackf. (Ind.), 89.

[2] 36 N. Y., 79.

[3] 9 Wheat. (U. S.), 616.

court, no warranty was implied. So in Blood *v.* French,[1] the court doubted "whether in an ordinary sale of goods by auction, an auctioneer, *virtute officii*, has any right or authority to warrant goods sold by him, in the absence of any express authority from his principal to do so, and without proof of some known and established usage of trade, from which an authority can be implied;" and it was decided, "that he has no such authority . . . where he acts as agent for an administrator, in selling the goods of his intestate. The nature of the sale, and the representative capacity in which the vendor acts in employing the auctioneer, preclude any implied right or authority in the latter to make a warranty."[2] And in The Monte Allegre,[3] Thompson, J., said: "Nor can . . . an auctioneer, while acting within the scope of his authority, be considered, in any respect whatever, as warranting the property sold."

§ 30. But it has also been held that the principal is liable for the fraud or deceit of his agent, in a sale, during the agency.

§ 31. As, for instance, in Hern *v.* Nichols,[4] where a factor sold certain silk, deceitfully representing it to be of another kind or quality; and

[1] 9 Gray (Mass.), 198.

[2] See, also, Mink *v.* Jarvis, 8 U. C. Q. B. 397.

[3] *Supra.*

[4] 1 Salkeld, 289.

Holt, C. J., was of the opinion, "that the merchant was answerable for the deceit of his factor, though not *criminaliter*, yet *civiliter;* for seeing some body must be a loser by the deceit, it is more reasonable that he who employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

§ 32. And in Smith *v.* Tracy,[1] Porter, J., put the principle thus: "When a party clothes another with authority to speak in his behalf, and indorses him to third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit, which he seeks to turn to his profit, was practised by him or his accredited agent.[2]

§ 33. It is immaterial, as respects third parties, whether the agent acts by the express direction,

[1] 36 N. Y., 83.

[2] See also Laughter *v.* Pointer, 5 B. & C. 547, 554; Udell *v.* Hamerton, 7 H. & N. 172; Barwick *v.* Bank, L. R. 2 Exch. 259; Mackay *v.* Bank, L. R. 5 P. C. 394; Bennett *v.* Judson, 21 N. Y. 238; Sandford *v.* Handy, 23 Wend. (N. Y.) 260; Cooley *v.* Perrine, 41 N. J. L. 332; Bolton *v.* Hillersden, 1 Ld. Raym. 224; Precious *v.* Abel, 1 Esp. 350; Rimell *v.* Sampayo, 1 C. & P. 254; Skinner *v.* Gunn, 9 P. (Ala.) 308.

or request of his principal, or by his permission merely;[1] but the principal will be bound if he afterward ratify the acts of his agent, though not originally commanded by him to be performed.[2]

*b. Effect of the Contract of Warranty by the Agent.*

§ 34. It is obvious that the fact of the agency must very clearly appear, before the court will admit the representations or undertakings of the agent to be offered in evidence;[3] but when the agency is proved, as has been stated, the contract made by the agent acting within the scope is binding on his principal.[4] Where a warranty is made by the agent for an undisclosed principal, it has been held a suit will lie in the latter's name against the purchaser;[5] but if the agent covenant in his own name, and does not attempt to bind his principal during the treaty of sale, the latter will not be liable to the purchaser on the warranty, unless he afterwards ratify it.

[1] Fay *v.* Richmond, 43 Vt. 25.

[2] Churchill *v.* Palmer, 115 Mass. 311; Hill *v.* North, 34 Vt. 604; Lane *v.* Dudley, 2 Murph. (N. C.) 119; Guilford *v.* Ashbraugh, 44 Iowa, 519; Croom *v.* Shaw, 1 Fla. 217.

[3] Applegate *v.* Moffitt, 60 Ind. 104; Skinner *v.* Gunn, 9 P. (Ala.) 308.

[4] Ezell *v.* Franklin, 2 Sneed (Tenn.), 242; Williamson *v.* Canaday, 3 Ired. (N. C.) 349.

[5] Ruiz *v.* Norton, 4 Cal. 355.

## Section II. The Contract of Warranty.

§ 35. It is not necessary, in order to constitute a warranty, that the seller should use the word "warrant,"[1] nor is any special form of words necessary;[2] but any affirmation or assurance of a fact, during the treaty of sale on the part of the seller, upon which the buyer is intended to, and actually does, rely in making his purchase, is sufficient to constitute a warranty.[3]

[1] Per Lord Holt in Crosse *v.* Gardner, Carthew, 90 [1688]; Medina *v.* Stoughton, Salkeld, 210; Pasley *v.* Freeman, 3 T. R. 57; Cave *v.* Coleman, 3 M. & R. 2; Hopkins *v.* Tanqueray, 15 C. B. 137; Warren *v.* Philada. Coal Co., 83 Pa. St. 440; Weimer *v.* Clement, 37 Pa. St. 147; Hawkins *v.* Pemberton, 51 N. Y. 198; Roberts *v.* Morgan, 2 Cow. (N. Y.) 438; O'Neal *v.* Bacon, 1 Houst. (Del.) 219; Randall *v.* Thornton, 43 Me. 226; Osgood *v.* Lewis, 2 H. & G. (Md.) 495; Hawkins *v.* Berry, 10 Ill. 39; Patrick *v.* Leach, 8 Neb. 530; Kinley *v.* Fitzpatrick, 4 How. (Miss.) 59; Carter *v.* Black, 46 Mo. 384.

[2] Pasley *v.* Freeman, 3 T. R. 57; Hopkins *v.* Tanqueray, 15 C. B. 137; Warren *v.* Philada. Coal Co., 83 Pa. St. 440; Weimer *v.* Clement, 37 Pa. St. 147; Blythe *v.* Speake, 23 Texas, 429; Carter *v.* Black, 46 Mo. 384; Horn *v.* Buck, 48 Md. 358; Hillman *v.* Wilcox, 30 Me. 170; Claghorn *v.* Lingo, 62 Ala. 230; Polhemus *v.* Heiman, 45 Cal. 573.

[3] See Pasley *v.* Freeman, 3 T. R. 51; Stucley *v.* Bailey, 1 H. & C. 405; Button *v.* Corder, 7 Taunt. 405; Medina *v.* Stoughton, 1 Ld. Raym. 593; Mason *v.* Chappell, 15 Grat. (Va.) 572; Leggatt *v.* Sands, 60 Ill. 158; Hastings *v.* Lovering, 2 Pick. (Mass.) 214; Patrick *v.* Leach, 8 Neb. 530; Little *v.* Wood-

§ 36. The principle was stated by Wilde, J., in Henshaw *v.* Robins,[1] as follows: "To create an express warranty the word warrant need not be used, nor is any precise form of expression necessary; but every affirmation at the time of the sale of personal chattels amounts to a warranty. . . . No expression of opinion, however strong, would import a warranty. But if the vendor *at the time of sale affirms a fact as to the essential qualities of his goods in clear and definite language, and the purchaser buys on the faith of such affirmation*, that, we think, is an express warranty." And, in Warren *v.* Phila. Coal Co.,[2] Woodward, J., said: "The word warrant . . . is not so technical that it may not be supplied by others. It is enough if the words used are not dubious or equivocal, and if it appears from the whole evidence that the affirmant

worth, 8 Neb. 281; Randall *v.* Thornton, 43 Me. 226; Polhemus *v.* Heiman, 45 Cal. 573; Smith *v.* Justice, 13 Wisc. 600; Chapman *v.* Murch, 19 John. (N. Y.) 290; Duffee *v.* Mason, 8 Cowen (N.Y.), 25; McFarland *v.* Newman, 9 Watts (Pa.), 55; McGregor *v.* Penn, 9 Yerg. (Tenn.) 74; Otts *v.* Alderson, 10 S. & M. (Miss.) 476; Weimer *v.* Clement, 37 Pa. St. 147. In an exchange, as well as a sale, to bind the seller by a warranty, it is not necessary that the word "warrant" should be used; Whitney *v.* Sutton, 10 Wend. (N. Y.) 411; Morgan *v.* Powers, 66 Barb. (N. Y.) 35.

[1] 9 Metc. (Mass.), 83.

[2] 83 Pa. St., 440.

intended to warrant, and did not express a mere matter of judgment or opinion."

§ 37. A warranty has been defined above as constituting one of the elements in a contract of sale, though collateral to the express object of it; and therefore, as the same consideration which is required to support the contract of sale, supports also the collateral contract of warranty, it follows that representations made, either before the sale to induce the purchaser to buy, or after the sale is completed, cannot constitute a warranty. It is true that it is not necessary that the statement or representation should be simultaneous with the close of the bargain. If it be part of the contract it matters not at what period of the negotiation it is made.[1] But if the representation be made before the sale, it must be given with direct reference to, and intended to constitute part of, the contract of, sale; or, if given after the sale, in order to constitute a warranty, it must have fresh consideration to support them.[2]

§ 38. Thus in Stucley *v.* Bailey[3] the plaintiff's agent, negotiating for the sale of a yacht, told de-

[1] Per Jervis, C. J., in Hopkins *v.* Tanqueray, 15 C. B. 138.

[2] Pope *v.* Lewyns, Cro. Jac. 630; Budd *v.* Fairmaner, 8 Bing. 48; Burdit *v.* Burdit, 2 Marsh. (Ky.) 143; Hogins *v.* Plympton, 11 Pick. (Mass.) 97.

[3] 1 H. & C., 405.

fendant's agent that he must have the masts overhauled by a shipwright; and defendant's agent subsequently said, "I have had a good overhaul at the masts, and find they are all as sound as ever." Plaintiff's agent then wrote to the defendant, offering £3000 for the yacht, observing that he would have to spend £500 in repairs, and defendant wrote back, declining to take less than £3500, adding: "You must, I think, be under some very great error in thinking that £500 would be required to be spent. Beyond the usual painting, caulking, etc., and perhaps a little repair to the copper, I don't really think there are any necessary repairs. Personally I know her sea-going qualities, and how thoroughly sound she is and tight in every part." In a subsequent letter defendant said: "Her masts have been examined and found as sound as when put in." After some further correspondence the plaintiff bought the vessel for £3375. Held, that assuming the representations in the letters were some evidence of a warranty, it was competent for the defendant to prove by extraneous matter, that no warranty was contemplated by the letters; but the court unanimously doubted whether the letters amounted to a warranty—per Pollock, C. B., Martin, Bramwell, and Channell, B. B. Martin, B., said: "A representation, to constitute a warranty, must be shown to

have been intended to form part of the contract. Here the defendant never intended that his statement as to the soundness of the masts should form part of the contract."

§ 39. In Craig *v.* Miller,[1] in a printed catalogue of sale, a bull was stated to be "a sure stock-getter;" but at the commencement of the sale the auctioneer publicly announced that the seller warranted nothing. Held, that, in order to maintain the action, the plaintiff would have to show that the warranty was imported into the sale at the auction. Gwynne, J., said: "If the plaintiff intended to insist, when the beast was knocked down to his bid, that the representation so relied on amounted to a warranty, and that he purchased upon the faith of it, it lay upon him to show that the representation so relied on was, in fact, imported into the actual sale which took place at the auction. . . . . The fallacy of the plaintiff's argument, as it appears to me, consists in attributing to the catalogue the character of the contract of sale."

§ 40. In Roscorla *v.* Thomas,[2] the declaration stated, that in consideration that the plaintiff, at the request of the defendant, had bought a

[1] 22 U. C. C. P., 348.

[2] 3 Q. B., 234.

horse of the defendant at a certain price; the defendant promised that the horse was free from vice; but, that it was in fact vicious. Held, on motion for arrest of judgment, to be bad, as the executed consideration, though laid with a request, neither impliedly raised the promise charged, nor would support it, if express. Lord Denman, C. J., remarked: "It may be taken as a general rule . . . . that the promise must be coextensive with the consideration. In the present case, the only promise that would result from the consideration, as stated, and be coextensive with it, would be to deliver the horse on request. The precedent sale, without a warranty, though at the request of the defendant, imposes no other duty or obligation upon him."

§ 41. In Congar *v.* Chamberlain,[1] A., having agreed to deliver certain fruit trees to B. early in the fall, to be sent to certain places in Minnesota before the frost set in, actually delivered them so late, that B. refused to accept them; and thereupon A. assured B. that there was still ample time to transport them before the frost, and that, if they were buried and frozen, etc., they would come out uninjured in the spring. Upon which B. agreed to take them. The court held this was

[1] 14 Wisc., 258.

a warranty subsequent to the sale, but good, as there was a fresh consideration.[1]

§ 42. In Wilson *v.* Ferguson,[2] however, it was held that a warranty of soundness given after the sale was complete, being *under seal*, could not be impeached for want of consideration.

§ 43. It has also been stated above, that a warranty must be a statement of a *fact* upon which the buyer relies in making his purchase; consequently words of description, or certain vague expressions of opinion, made by the seller, as to the quality or value of his goods, or for the simple commendation of them, are not to be treated as warranties, and the maxim is, *simplex commendatio non obligat.*[3]

§ 44. The rule was thus put by Robertson, J.,

[1] See Camac *v.* Warriner, 1 C. B. 356; Summers *v.* Vaughan, 35 Ind. 323; Towell *v.* Gatewood, 2 Scam. (Ill.) 22; Bloss *v.* Kittridge, 5 Vt. 28; Vincent *v.* Leland, 100 Mass. 432; Grant *v.* Caldwell, 8 U. C. Q B. 161.

[2] Cheves (S. C.), 190.

[3] Chandelor *v.* Lopus, Cro. Jac. 4; Jendwine *v.* Slade, 2 Esp. 572; Dyer *v.* Hargrave, 10 Ves. 505; Freeman *v.* Baker, 5 B. & Ad. 797; Lomi *v.* Tucker, 4 C. & P. 15; Power *v.* Barham, 4 Ad. & E. 473; Vernon *v.* Keys, 12 East, 632; Horton *v.* Green, 66 N. C. 596; Willard *v.* Stevens, 24 N. H. 271; Myers *v.* Conway, 62 Ind. 474; Byrne *v.* Jansen, 50 Cal. 624; Baker *v.* Henderson, 24 Wisc. 509; McFarland *v.* Newman, 9 Watts (Pa.), 55; Jackson *v.* Wetherell, 7 S. & R. (Pa.) 480.

in Mason *v.* Chappell:[1] "To constitute a warranty no particular form of expression is required; an apparent intention to warrant is sufficient. It is enough if the words used import an engagement on the part of the vendor that the article is what he represents it to be. Any *distinct affirmation* of quality made by the vendor, at the *time of the sale*, not, as an *expression of opinion or belief*, but as an *assurance* to the purchaser *of the truth of the fact affirmed*, and an *inducement* to him to make the purchase, is, if *accordingly received*, and *relied on*, and *acted upon* by the purchaser, an express warranty. But *no affirmation, however strong*, will constitute it, unless it was so *intended*. If it is intended as a warranty, the vendor is liable, if it turns out to be false, however honest he may have been in making it; but if it is *intended as an expression of opinion merely, or as simple praise or commendation of the article*, he is not liable, unless it can be shown that he knew at the time that it was untrue. And in that case it is inaccurate to say that he is liable for a breach of warranty. His liability arises from the fraud of which he was guilty."

§ 45. It is often extremely difficult to determine whether the representation of the seller is a state-

[1] 15 Grat. (Va.), 572.

ment of a *fact*, upon which the seller is induced to rely in making his purchase, and which, if so, would constitute a warranty, or whether it is a mere expression of opinion with regard to the article sold, in respect to which the buyer has the same opportunities of judging as the seller, and by which the seller does not mean to be bound; and the following cases are given as illustrations of, what language has been considered to constitute a warranty, and what, mere words of description, or opinion.

§ 46. In Budd *v.* Fairmaner,[1] the words of a receipt ran: "Received of A. B. (the purchaser), £10 for a gray four-year old colt, warranted sound in every respect," and it was held that the warranty was restricted to the soundness of the article, the age being mere matter of description. So, in Willard *v.* Stevens,[2] where the following note was offered in evidence: Bought one red horse, six years old, for one hundred and twenty-five dollars, which I warrant sound and kind," the court held the warranty not to extend to the horse's age.

§ 47. In Adams *v.* Rogers,[3] it was held that a contract for flour warranted to be "superfine," was

[1] 8 Bing., 48.

[2] 24 N. H., 271; see, also, Dickenson *v.* Gupp, quoted in Budd *v.* Fairmaner, 8 Bing. 48; Richardson *v.* Brown, 1 Bing. 344.

[3] 9 Watts (Pa.), 121.

a stipulation that it was of the due fineness, and merchantable, as superfine flour, according to the standard of inspection required by the act (of April 15th, 1835) relating to inspection.

§ 48. In Colthard *v.* Puncheon,[1] proof that a horse was a good drawer, was held not sufficient to satisfy a warranty that he was "a good drawer, and pulls quietly in harness."

§ 49. In Wood *v.* Smith,[2] an action of assumpsit was brought for breach of contract of warranty, the defendant saying that a mare sold was "sound to the best of his knowledge," but adding, "I never warrant; I would not even warrant myself;" but defendant knew the mare to be unsound; and it was held, as the defendant knew of the unsoundness, that the words "sound to the best of his knowledge," constituted a qualified warranty, and that the action lay.

§ 50. In Cook *v.* Moseley,[3] an affirmation that a horse was *not lame*, accompanied by the seller's declaration that he would not be afraid to warrant him, was held sufficient to constitute a warranty.

§ 51. In Hogins *v.* Plympton[4] it was held, *inter alia*, that the words, in a written agreement of sale,

[1] 2 Dowl. & Ry., 10.

[2] 5 M. & R., 124. In Myers *v.* Conway, 62 Ind. 474, the court held that the assertion, sound to the best of the seller's knowledge, in the absence of fraud, was not a warranty.

[3] 13 Wend. (N. Y.), 277.

[4] 11 Pick. Mass., 97.

"good fine wine," were too indefinite to constitute a warranty of quality.

§ 52. In Pennsylvania, in McFarland *v.* Newman,[1] the court below charged the jury that "*a positive averment, made by the defendant at the time of the contract of a material fact is a warranty, that it is part and parcel of the contract.*" Held, on appeal, to be error. Gibson, J., said: "The naked averment of a fact is not a warranty, . . . the jury must be satisfied from the whole that the vendor actually, and not constructively, consented to be bound for the truth of his representations; . . . but a naked affirmation is not to be dealt with as a warranty merely because the vendee had gratuitously relied on it."[2]

§ 53. In Warren *v.* Phila. Coal Co.,[3] the defendants on purchasing some coal, "inquired of the plaintiff, particularly of the quality of the coal; who assured him it was of the same quality he had been buying." Defendants then told him, "if so, to put it on the wharf at $4 per ton, but if it was not good coal he would not have it;" and in view of this, it was proposed to show that a large amount delivered was not good, and also that defendants

[1] 9 Watts (Pa.), 55; see, also, Foster *v.* Caldwell, 18 Vt. 176; and, also, Kenner *v.* Harding, 85 Ill. 264.

[2] This case, however, has been doubted.

[3] 83 Pa. St., 437.

had repeatedly told plaintiff that if the coal was not good, he must take it away, as defendants would not retain it. Held, on appeal, it was error to reject these offers, as "the defendants alleged the existence of a contract that defined their rights, and there was evidence from which the jury might have inferred an agreement on the part of the plaintiff to be answerable for the quality of the coal they were to deliver."

§ 54. In Stroud *v.* Pierce,[1] the court said, a "representation that *a pianoforte is well made and up to concert pitch*, is a representation of a fact, which if proved to be false, as between a seller making the representation and a buyer relying upon it, would authorize the buyer to recover.[2]

[1] 6 Allen (Mass.), 416.

[2] See, also, Anthony *v.* Halstead 37 L. T. (N. S.) 433; Chalmers *v.* Harding, 17 L. T. (N. S.) 571; Powell *v.* Horton, 2 Bing. N. C. 668; Yates *v.* Pym, 6 Taunt. 446; Buchanan *v.* Parnshaw, 2 T. R. 745; Bryce *v.* Parker, 11 S. C. 337; Swett *v.* Colgate, 20 John. (N. Y.) 203; McFarland *v.* Newman, 9 Watts (Pa.), 55; Baker *v.* Henderson, 24 Wisc. 509; Smith *v.* Justice, 13 Wisc. 600; Kerr *v.* Schrader, 1 W. N. C. (Phila.) 33; Beale *v.* Olmstead, 24 Vt. 115; Baird *v.* Mathews, 6 Dana (Ky.), 131; Towell *v.* Gatewood, 2 Scam. (Ill.) 22; Hillman *v.* Wilcox, 30 Me. 170; Foggart *v.* Blockweller, 4 Ired. (N. C.) 238; Baum *v.* Stevens, 2 ib. 411; Wolcott *v.* Mount, 38 N. J., L. R. 496; Clark *v.* Ralls, 50 Iowa, 275; Geenthal *v.* Schneider, 52 How Pr. (N. Y.) 133; Irge *v.* Bond, 3 Hawks (N. C.), 101; Byrne *v.* Jansen, 50 Cal.

§ 55. The well-known cases of Jendwine *v.* Slade,[1] Power *v.* Barham,[2] and Lomi *v.* Tucker[3] are good examples of the general rule, where the subject matter was the sale of pictures. Jendwine *v.* Slade,[4] was a sale of two pictures, one a sea piece said to be by Claud Lorraine, the other a fair, by Teniers, which were advertised as of these artists in the catalogue. The pictures turned out copies, though several of the most eminent artists and picture dealers were called, who differed in their opinions respecting the originality of the pictures. Lord Kenyon said: "It was impossible to make this the case of a warranty; the pictures were the work of artists some centuries back, and there being no way of tracing the picture itself, it could only be matter of opinion, whether the picture in question was the work of the artist whose name it bore or not. What does the catalogue import? That, in the opinion of the seller, the picture is the work of the artist whose name he has affixed to it. . . . The catalogue . . . leaves the determination to the judgment of the buyer, who is to exercise that judgment in the purchase." In Power *v.* Barham,[5] the bill of par-

624; Ayres *v.* Parks, 3 Hawks (N. C.), 59; Jackson *v.* Crane, 61 Ga. 392; Baker *v.* Fawks, 35 U. C. Q B. 302.

[1] 2 Esp., 572. [2] 4 A. & E., 473.

[3] 4 C. & P., 15. [4] *Supra.* [5] *Supra*, tried in 1836.

cels ran: four pictures, views in Venice, Canaletto; they turned out copies, and it was left to the jury to say whether this was a warranty, or an expression of opinion, which did not amount to a warranty. Lord Denman observed: "It may be true that, in the case of very old pictures, a person can only express an opinion as to their genuineness, and that is laid down by Lord Kenyon. . . . But the case here is that pictures are sold with a bill of parcels, containing the words 'four pictures, views in Venice, Canaletto.' . . . It was, therefore, for the jury to say, under all the circumstances, what was the effect of the words, and whether they implied a warranty of genuineness, or conveyed only a description or expression of opinion. I think their finding was right. Canaletto is not a very old painter."[1] In Lomi *v.* Tucker,[2] the sale was "a couple of Poussins," in reality not originals but very excellent copies, for £95, and it was contended that the price showed that they were never intended to be sold as originals. Lord Tenterden, however, left it to the jury to say whether the defendant bought these pictures believing them to be originals.

§ 56. The mode of constructing the warranties

[1] Canaletto died in 1768; Claud Lorraine died in 1682; and Teniers, the younger, in 1694.

[2] 4 C & P., 15.

of horses, sheep, cattle, etc., is not different from that employed in the construction of other kinds of warranties. There is, however, a certain difficulty from the fact, that with respect to the warranty of soundness, certain judges have laid down the rule that the disease or injury, to constitute a breach of warranty, must be not *temporary*, but *permanent* in its nature.[1]

§ 57. In Elton *v.* Brogden[2] it was proved and admitted that the horse was lame at the time of the sale; but the defendant undertook to prove that the lameness was of a temporary nature, and that he had become in all respects sound. Lord Ellenborough said: "I have always held, and now hold, that a warranty of soundness is broken if the animal, at the time of the sale, had any infirmity upon him which rendered him less fit for present service. It is not necessary that the disorder should be permanent or incurable. While a horse has a cough, I say he is unsound; whether that be temporary or prove mortal. The horse in question, having been lame at the time of the sale, when he was warranted sound, his condition subsequently is no defence to the action." And in Elton *v.* Jordan[3] the same learned judge said: "That to

[1] See Brown *v.* Bigelow, 10 Allen (Mass.), 242; Bolden *v.* Brogden, 2 Moo. & R. 113; Kiddell *v.* Burnard, 9 M. & W. 668.

[2] 4 Camp., 281. [3] 1 Stark R., 127.

constitute unsoundness, it is not essential that the infirmity should be of a permanent nature; it is sufficient if it render the animal for the time unfit for service; as, for instance, a cough, which for the present renders it less useful, and may ultimately prove fatal. Any infirmity which renders a horse less fit for present use and convenience is unsoundness."

§ 58. In Garment *v.* Barrs,[1] however, Eyre, C. J., asserted a somewhat different rule. He said: "A horse laboring under a temporary injury or hurt, which is capable of being speedily cured or removed, is not, for that cause, an unsound horse; and when a warranty is made that such a horse is sound, it is made without any view to such injury; nor is a horse, so circumstanced, an unsound horse within the meaning of the warranty." And so, in Bolden *v.* Brogden,[2] the question left to the jury was, whether the disease was such as calculated, permanently to injure the horse, or permanently to diminish his usefulness.

§ 59. In America, in Brown *v.* Bigelow,[3] where the jury found that the lameness was likely to be permanent, and rendered a verdict for the purchaser, Bigelow, C. J., in criticizing the verdict, said: "Lameness may or may not make a horse

[1] 2 Esp., 673.
[2] 2 Moo. & R., 113.
[3] 10 Allen (Mass.), 242.

unsound. If it was only accidental or temporary, it would not be a breach of warranty; but if it was chronic and permanent, . . . it would be clearly a case of unsoundness." . . . The reasonable inference is that the warranty was intended to guard against the danger of loss in the event that the lameness proved serious and permanent.

§ 60. It is possible to conceive a distinction between an incurable disease, and an accidental hurt or injury, temporary in its nature, and not likely to degenerate into a permanent defect. In the latter case, an animal might in one sense be said to be sound—that is, free from permanent disease; while in the former, evidently not. An animal, usually, however, is purchased for present use, and when the ordinary, practical purchaser bargains for a sound animal, he usually means one *ready for present use;* and does not intend to go into the question, as to whether the animal is permanently diseased or merely suffering from a temporary hurt; or to purchase one which, some time in the future, he may use.

§ 61. This was well put by Woods, J., in Roberts *v.* Jenkins.[1] After approving the rule laid down by Lord Ellenborough in the cases above quoted, he said at page 119: "If a horse be afflicted with an infirmity which renders him less

[1] 21 N. H. 116, 119.

fit for immediate use than he otherwise would be, and less able to perform the proper and ordinary labor of a horse, it would seem but reasonable that it should be regarded as an unsoundness, for which a party selling the horse and warranting its soundness should be held responsible. Such an infirmity may well be supposed to be the occasion of damage to the purchaser. The intention and understanding of the parties to the warranty are, in such as well as in all other contracts, to govern their construction. It is in the use of a horse that his value principally consists. It may well be presumed, then, that when a horse is purchased, he is purchased for service; and that it is with reference to his ability and fitness for service that a guaranty of soundness would ordinarily be required or given. And we can see no reason for supposing that *the future fitness or usefulness of the horse would be likely to be more an object of solicitude on the part of the purchaser than his present fitness.* And when we consider the subject-matter of such a guaranty, we can see no reason to suppose that, in such cases, the parties do not at least intend, by a general warranty of soundness, that *at the time of the sale*, the animal is laboring under no disease or injury, which *at the time or afterwards, does, or will diminish* his natural and ordinary usefulness and fitness for service."

§ 62. The rule laid down by Lord Ellenborough in the cases cited, namely, that "any infirmity which renders a horse less fit for *present* use and convenience is unsoundness," was approved by all the judges in Kiddell *v.* Burnard,[1] and also in Holliday *v.* Morgan;[2] and the doctrine of Bolden *v.* Brogden,[3] and Garment *v.* Barrs,[4] would seem at present not to prevail in England. In the United States, though the *dictum* of Judge Bigelow, in Brown *v.* Bigelow,[5] is the other way, yet the rule of Lord Ellenborough has been followed in Burton *v.* Young,[6] Kornegay *v.* White,[7] and Roberts *v.* Jenkins,[8] and is obviously the more logical and reasonable rule.

§ 63. The following defects and diseases have been considered to constitute unsoundness in horses:[9] The glanders,[10] corns,[11] bone spavin in the

[1] 9 M. & W., 668; *per* Parke, Alderson, Gurney, and Rolfe, BB.

[2] 1 E. & E., 1; *per* Hill, J.

[3] 2 Moo. & R. 113.

[4] 2 Esp. 673.

[5] 10 Allen (Mass.), 244.

[6] 5 Harr. (Del.), 233.

[7] 10 Ala., 255.

[8] 21 N. H., 116.

[9] See Story on Sales, § 362; Benjamin on Sales, § 941, 4th Amer. ed., Corbin.

[10] Woodbury *v.* Robbins, 10 Cush. (Mass.) 520.

[11] Alexander *v.* Dutton, 58 N. H. 282.

hock,[1] the navicular disease,[2] any organic defect,[3] blindness or defect in one eye,[4] ossification of the cartilages,[5] thick wind;[6] whether a splint constitutes unsoundness would, perhaps, depend upon its situation;[7] for roaring, see Bassett *v.* Collins[8] and Onslow *v.* Eames;[9] crib biting affecting the health;[10] and it is a breach of warranty "against all vices,"[11] or that a horse is sound and right;"[12] mere badness of shape or defective formation, which has not produced lameness at the time of the sale is not unsoundness;[13] certain congenital defects as, for instance, a convexity in the eye,

[1] Watson *v.* Penton, 7 C. & P. 85.

[2] Bywater *v.* Richardson, 1 A. & E. 508; Huston *v.* Plato, 3 Col. 402.

[3] Best *v.* Osborne, Ry. & Mo. 290.

[4] House *v.* Fort, 4 Bl. (Ind.) 294; Burton *v.* Young, 5 Harr. (Del.) 233.

[5] Oliphant, Law of Horses, 467, App.

[6] Ibid., 472, Appendix.

[7] Margetson *v.* Wright, 8 Bing. 454.

[8] 2 Camp., 523.

[9] 2 Stark R., 72.

[10] Washburn *v.* Cuddihy, 8 Gray, Mass. 430. See, also, Dean *v.* Morey, 33 Iowa, 120.

[11] Scholefield *v.* Robb, 2 Moo. & R. 210.

[12] Walker *v.* Hoisington, 43 Vt. 608.

[13] Brown *v.* Elkington, 8 M. & W. 132.

causing near-sightedness and bad habits, therefrom;[1] goggles in sheep;[2] also foot-rot in sheep.[3]

§ 64. But where the seller states a defect, and gives a warranty of soundness, in other respects, the buyer must prove, in an action for breach of warranty, that the animal's unsoundness proceeded from other defects, and not from that pointed out at the sale.[4]

§ 65. Where the contract of sale is reduced to writing, all prior representations are considered to be merged in the written contract, and parol evidence will not be admitted to vary or add to the written instrument, and consequently if there be no warranty in the written contract the court will not permit one to be proved by parol. An illustration of this principle is had in Randall & Co. *v.* Rhodes.[5] Here R. & Co. purchased of Rhodes,

[1] Holliday *v.* Morgan, 1 E. & E. 1. See also generally, Shillitoe *v.* Claridge, 2 Chitty, R. 425; King *v.* Price, 2 ib. 416; Coates *v.* Stephens, 2 Moo. & R. 157; Dean *v.* Morey, 33 Iowa, 120; Bailey *v.* Forrest, 2 C. & K. 131; Dickenson *v.* Follett, 1 Moo. & R. 299; Brown *v.* Elkington, 8 M. & W. 132; Kenner *v.* Harding, 85 Ill. 264; Zimmerman *v.* Morrow, 28 Minn. 367.

[2] Joliff *v.* Bendell, Ry. & Mo. 136.

[3] Pinney *v.* Andrus, 41 Vt. 631.

[4] Irvin *v.* Rankin, Addison (Pa.), 146; Roberts *v.* Morgan, 2 Cow. (N. Y.) 438; Morrill *v.* Bemis, 37 Vt. 65.

[5] 1 Curt., C. C., 90.

through Brown, Rhodes's agent, the bark Baltic, supposing it to be of white oak, as Brown asserted to them that it was, and the following note was signed by the buyer, and a similar one by the seller, viz: "Sold to R. & Co. this day, through Brown, the bark Baltic, now at East Boston, for $12,000, to be paid next Tuesday, as follows: . . . Full packages of beef, etc., to be taken out by the owners, all other small stores belonging to the vessel." The breach was, that the vessel turned out not to be built of white oak. The notes were put in evidence, and plaintiffs attempted to prove the representations of Brown, which were rejected by the court, on the ground that the whole contract was embraced in the above notes. Curtis, J., said: "Now the general rule is, that when negotiations have terminated in a written contract, the parties thereby tacitly affirm that such writing contained the whole contract, and no new terms are allowed to be added to it by extraneous evidence. It is argued that this memorandum is not the written contract of sale; that it only contains a statement of the fact, that a sale has been made, and a description of the thing sold, the price, and the terms of the credit. But this is all that is necessary to make a complete contract of sale; and to assume that anything more existed, and allow it

to be shown, would violate the rule above stated. It is true, that in Bradford *v.* Manly,[1] and Hastings *v.* Lovering,[2] it was held that a bill of parcels was not the contract of sale, it being intended, as the court says, in the first of those cases, only as a receipt for the price and not to show the terms of the bargain. But here the writing could not have been intended for a receipt, and must have been intended to set forth, what it does set forth, a contract of sale, and if so, it must be taken to embrace the whole contract, and consequently a warranty was not one of its terms."[3]

§ 66. Where, however, the writing is a mere memorandum of the contract or receipt, and does not contain all the terms of the contract, parol evidence is admissible to explain or qualify, etc., the writing. Thus, in Towell v. Gatewood[4] the receipt ran: "Mr. E. H. Gatewood bought of H. & I. Towell, two thousand nine hundred and fifty-one pounds good, first, and second rate tobacco at $4.56, at $132.79½. Received payment by the

[1] 13 Mass., 139. [2] 2 Pick. (Mass.), 214.

[3] See also Kain *v.* Old, 2 B. & C. 627; Lamb *v.* Crafts, 12 Metc. (Mass.) 353; Van Ostrand *v.* Reed, 1 Wend. (N. Y.) 424; Galpin *v.* Atwater, 29 Conn. 93; Pender *v.* Fobes, 1 D. & B. (N. C.) 250; Bond *v.* Clark, 35 Vt. 577; Mullain *v.* Thomas, 43 Conn. 252.

[4] 2 Scam. (Ill.), 23.

hands of L. Kirkham. H. T.—I. T." And the court, on appeal, said they "could not consider the paper in question as containing the evidence of the bargain entered into by the parties. It possesses none of the constituent parts of a contract, but is, in form and in fact, a bill of parcels, and an acknowledgment of the receipt of the purchase-money, and as such was properly received in evidence; but it does not follow that because it is evidence as far as it goes, it is all the evidence that ought to be received."[1]

§ 67. The following are a few illustrations of the constructions the courts have put upon written contracts and bills of parcels:—

§ 68. In Bigge *v.* Parkinson[2] a written guaranty was given by the seller, that certain provisions for a transport ship should be such as would pass an inspection by the officers of the East India Company. The court held that, this did not dispense with the implied warranty that the provisions should be fit for the intended use.[3]

[1] See also Bradford *v.* Manly, 13 Mass. 139; Hastings *v.* Lovering, 2 Pick. (Mass.) 214; Hogins *v.* Plympton, 11 ib. 97; Filkins *v.* Whyland, 24 Barb. (N. Y.) 379; Merrick *v.* Bradley, 19 Md. 50; Allen *v.* Pink, 4 M. & W. 140.

[2] 7 H. & N., 955.

[3] See also Dickson *v.* Zizania, 10 C. B. 602; Bywater *v.* Richardson, 1 A. & E. 508.

§ 69. In Cramer *v.* Bradshaw,[1] where, by a bill of sale, B. bargained, sold, granted, etc., a negro woman slave, named, etc., *being of sound mind and limb, and free from all disease*, the court held these words not to be descriptive, but to be an averment of a fact, and in consequence to constitute a warranty of soundness.

§ 70. In Duff *v.* Ivy[2], a receipt, running: "Received of A. P. . . . for a negro named Charley, which I *warrant* and *defend* unto the said D.," was held to constitute a warranty of soundness and title.

§ 71. In Howell *v.* Cowles,[3] H. hired a negro from C. to work for a year, giving C. a bond binding the hirer to pay on a certain day "$135, being for the hire of a negro man, for the present year, by the name of *Tom*, to work *at boat business*, said negro to be clothed," etc., and it was held that the words *to work at boat business* were descriptive only. And in Wasen *v.* Rowe,[4] where the bill of sale ran: "W. bought of E. R. one bay horse, five years old last July, considered sound, price $65; received payment, E. R.," it was held not to constitute a warranty of soundness. So in Dick-

[1] 10 John. (N. Y.), 484.

[2] 3 Stew. (Ala.), 140; Blythe *v.* Speake, 23 Tex. 429; but see Cowan *v.* Silliman, 4 Dev. (N. C.) 46.

[3] 6 Grat. (Va.), 393. [4] 16 Vt., 525.

enson *v.* Gapp,[1] a paper reading: "Received $100 for a bay gelding, got by Cheshire Cheese, warranted sound," was decided not to constitute a warranty that the horse was bred as named.

§ 72. If the warranty be couched in technical terms, they are to be interpreted according to their technical signification, unless it appear that the buyer and seller attributed different senses to them.

§ 73. As, in Hutchison *v.* Bowker,[2] where the defendants wrote to the plaintiffs, offering them a quantity of "good" barley, to which plaintiffs answered, "we accept," . . . expecting you will give us "fine" barley. Defendants then stated their letter contained no such expression as "fine" barley, and declined to ship the same. Evidence was given on the trial that "good" and "fine" barley were different commodities in the trade, and the jury so found. Held, the jury having so found, the construction of the contract was for the court, and that there was not a sufficient acceptance.

§ 74. Frequently in order to arrive at the meaning of the parties, it will be found necessary to consult some usage or custom; the question of

[1] Quoted in Budd *v.* Fairmaner, 8 Bing., at p. 50.

[2] 5 M. & W., 535.

usage, however, will more appropriately be considered hereafter, under Implied Warranties.[1]

§ 75. Where the warranty is to remain in force for a specified term, as "till twelve o'clock," or "for a month," the fault or defect assigned as a breach of warranty must be discovered and pointed out within the time specified.[2]

§ 76. It was formerly supposed that there could be no warranty against a future event;[3] but it seems that now the law is otherwise. On principle, there is apparently no reason why a man should not warrant against a future event. The authorities, however, are somewhat scant.

§ 77. In Eden *v.* Parkinson[4] Lord Mansfield said: "There is no doubt but you may warrant against a future event."

§ 78. In Osborn *v.* Nicholson,[5] in 1861, a slave owner sold a slave, taking from the purchaser a note, and executed the following bill of sale: "For the consideration of $1300, I hereby transfer all

[1] On this point see, however, Yates *v.* Pym, 6 Taunt. 446; Powell *v.* Horton, 2 Bing. N. C. 668; Jones *v.* Bowden, 4 Taunt. 847; Marshall *v.* Perry, 67 Me. 78; Fisher *v.* Favor, 15 Gray (Mass.), 82.

[2] Bywater *v.* Richardson, 1 A. & E. 508; Chapman *v.* Gwyther, L. R., 1 Q. B. 463.

[3] 3 Bl. Com., 166.

[4] 2 Douglass, 735.

[5] 13 Wallace, 654.

the right, title, and interest I have in a negro boy named Albert, aged twenty-three years. I warrant said negro to be sound in body and mind, *and a slave for life;* and I also warrant the title to said boy clear and perfect."

In 1869, on a suit on the note, defendant pleaded the warranty, and assigned as the breach, the Thirteenth Amendment to the Constitution of the United States, by virtue of which the slave had been liberated, and insisted, therefore, there could be no recovery. A demurrer to the plea was overruled by the court below, and on appeal to the Supreme Court of the United States, the action of the lower court was reversed, and the action was held to lie on the ground, that though a warranty against a future event is valid, yet an ordinary warranty of title and quiet possession, such as the above, never was contemplated to extend to such a sovereign act as the passage of the Thirteenth Amendment, and, therefore, was not violated by the loss of the slave, by virtue of the Amendment. The reader is also referred to the cases of Hambright *v.* Stover,[1] Richardson *v.* Mason,[2] and Leggatt *v.* Sands,[3] which all seem to recognize the validity of a future event.

§ 79. Usually a general warranty is not considered to extend to faults or defects that are appa-

[1] 31 Ga., 300. [2] 53 Barb. (N. Y.), 601. [3] 60 Ill., 158.

rent on inspection; and the reason is, that the warranty cannot operate as a deceit in respect to defects which are manifest; and because it is improbable, in the absence of an express warranty, that either party contemplated a guaranty against what each might see, and should know.

§ 80. Thus in Bayly *v.* Merrel,[1] where there was an agreement to carry goods at so much per cwt., it was held an action would not lie, for falsely asserting that the goods contained a less quantity, than in fact they weighed; as the plaintiff might have found out the truth, and it was gross negligence in him not to do so. So in Dean *v.* Morey,[2] it was held that the failure of the vendor to disclose the fact of his horse being a cribber, furnished no cause of action to the buyer, as it appeared that an examination of the horse's mouth would have disclosed the defect.[3]

[1] Cro. Jac., 386. [2] 33 Iowa, 120.

[3] See, also, Palmer *v.* Skillenger, 5 Harr. (Del.) 234; Chadsey *v.* Greene, 24 Conn. 562; Scarborough *v.* Reynolds, 13 Richardson (S. C.), 98; House *v.* Fort, 4 Blackf. (Ind.) 296; Hill *v.* North, 34 Vt. 604; Williams *v.* Ingram, 21 Texas, 300; Ricks *v.* Dillahunty, 8 Port. (Ala.) 134; Huston *v.* Plato, 3 Col. 402; Schuyler *v.* Russe, 2 Caines Term R. (N. Y.) 202; Vandewalker *v.* Osmer, 65 Barb. (N. Y.) 556; Richardson *v.* Johnson, 1 La. Ann. 389; Fisher *v.* Pollard, 2 Head. (Tenn.) 314; Mulvany, *v.* Rosenberger, 18 Pa. St. 203; Birdseye *v.* Frost, 34 Barb. (N. Y.) 367; Brown *v.* Bigelow, 10 Allen (Mass.), 242.

§ 81. But a seller may expressly warrant against visible defects.

§ 82. As in Pinney *v.* Andrus,[1] where it was held, that a warranty against the foot-rot in sheep was valid, whether the existence of the disease was obvious or even known to the buyer when he made the purchase. So in Liddard *v.* Kain,[2] in a sale of horses, one horse had a swelled limb, and the other a cough, both facts known to the buyer; but the seller agreed to deliver the horses in a fortnight, sound and free from blemishes, and this was held to include the above defects, though known to the seller. And in Kenner *v.* Harding,[3] where the seller of a mare and mule had them stabled together in a single stall, and assured the buyer, when about to examine them, that the mule was sound, upon which they were bought, and the mule's pastern joints at the time were crooked, over, and it was lame; the court held the warranty to cover the lameness.[4]

§ 83. A warranty, as has been stated, is a question of intention, and it is the province of the jury to determine the weight and effect to be attached to the verbal representations and affir-

[1] 41 Vt., 631. [2] 2 Bing., 183. [3] 85 Ill., 264.

[4] See, also, Margetson *v.* Wright, 7 Bing. 603; 8 Bing., 454; Dyer *v.* Hargrave, 10 Ves. 505; Butterfield *v.* Burroughs, 1 Salk. 211; Southerne *v.* Howe, 2 Rolle, 5.

mations of the seller.[1] Even where the contract is in writing it has sometimes been left to the jury to pass upon the meaning of the writing. Usually, however, where the contract has been reduced to writing, it is for the court to interpret the meaning of the instrument.[2] And it has

[1] See Stucley *v.* Bailey, 1 H. & C. 405; Baum *v.* Stevens, 2 Ired. (N. C.) 411; Alexander *v.* Dutton, 58 N. H. 282; Baker *v.* Fawkes, 35 U. C. Q. B. 302; Bennet *v.* Tregent, 24 U. C. C. P. 565; Boothby *v.* Scales, 27 Wisc. 626; Bradford *v.* Bush, 10 Ala. 386; Duffee *v.* Mason, 8 Cowen (N. Y.), 25; Chisholm *v.* Proudfoot, 15 U. C. Q. B. 203; Foggart *v.* Blackweller, 4 Ired. (N. C.) 238; Horn *v.* Buck, 48 Md. 358; Humphreys *v.* Comline, 8 Blackf. (Ind.) 516; Henson *v.* King, 3 Jones (N. C.), 419; Foster *v.* Caldwell, 18 Vt. 180; Kinley *v.* Fitzpatrick, 4 How. (Miss.) 59; Murray *v.* Smith, 4 Daly (N. Y.), 278; McDonald *v.* Thomas, 53 Iowa, 559; Morrill *v.* Wallace, 9 N. H. 111; McFarland *v.* Newman, 9 Watts (Pa.), 55; Rogers *v.* Ackerman, 22 Barb. (N. Y.) 134; Brown *v.* Bigelow, 10 Allen (Mass.), 243; Caldwell *v.* Wallace, 4 S. & P. (Ala.) 282; Duff *v.* Ivy, 3 Stew. (Ala.) 140; Cowan *v.* Silliman, 4 Dev. (N. C.) 46; McGregor *v.* Penn, 9 Yerger (Tenn ), 74; Cook *v.* Moseley, 13 Wend. (N. Y.) 277; Jack *et al. v.* R. R. Co., 53 Iowa, 399; Nelson *v.* Biggers, 6 Ga. 205; Thorne *v.* McVeagh, 75 Ill. 81; Warren *v.* Phila., etc., Co., 83 Pa. St. 437; Horton *v.* Green, 66 N. C. 596; Starnes *v.* Erwin, 10 Ired. (N. C.) 226; Crenshaw *v.* Slye, 52 Md. 140.

[2] See preceding cases in text, and Horn *v.* Buck, 48 Md. 358; Osgood *v.* Lewis, 2 H. & G. 495; Claghorn *v.* Lingo, 62 Ala. 230; Mason *v.* Rowe, 16 Vt. 525. See, also, Hutchison *v.* Bowker, 5 M. & W. 535.

sometimes been held, where the verbal representations are unequivocal, that the court may pass upon its construction.

§ 84. Thus in Stroud *v.* Pierce,[1] the ruling of the court below was, that "a representation, that *a pianoforte is well made and up to the concert pitch*, is a representation of a fact, which, if proved to be false, as between a seller making the representation and a buyer relying upon it, would authorize the buyer to recover." On appeal, Chapman, J., said: "The word representation was undoubtedly used here as synonymous with affirmation, and there can be no doubt that such an affirmation is a warranty. . . . . The defendant contends that it should have been left to the jury to find whether this language was used with the intention of affirming the fact, or of expressing an opinion. But the intent of the party is immaterial."

[1] Allen (Mass.), 413. See, also, upon this point, Daniels *v.* Aldrich, 42 Mich. 58; Smith *v.* Justice, 13 Wisc. 600; Jackson *v.* Wetherell, 7 S. & R. 480; McFarland *v.* Newman, 9 Watts (Pa.), 55.

# CHAPTER III.

## THE IMPLIED CONDITIONS OF EXISTENCE, IDENTITY, AND MANUFACTURE.

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SECTION III. THE IMPLIED CONDITION OF MANUFACTURE.

Remarks of Brett, L. J., in Johnson *v.* Raylton, § 141.

§ 85. In the treatment of the subject of the warranties that are implied in the sale of personal property, it will be found convenient: first, to examine certain conditions that are implied in the sales of chattels, which have frequently been confounded with, and held to be, warranties; and which, in consequence, has created some confusion in the law: and then, to consider the warranties that are implied in sales.

## Section I. The Implied Condition of Existence.

§ 86. It has sometimes been thought, that the existence of the thing sold was an implied warranty, collateral to, the principal contract of sale; but it is obvious, that the existence of the thing sold is an essential element in the contract of sale, since, without the existence of the article contracted for, at the time arranged for delivery, there can be no sale; consequently, as the existence of the subject-matter of the sale is an essential element in the principal contract, it cannot be said to form part of the collateral contract.

§ 87. In Terry *v.* Bissell[1] [1857] the defendants sold to plaintiff a note purporting to be signed by A., and indorsed by B.; B.'s signature, how-

[1] 26 Conn., 23.

ever, was a forgery. On the note being protested, plaintiff discovered the forgery, and offered to return the note, demanding back the price. Defendants declined to receive the note, or return the price. Both the parties at the sale were ignorant of the forgery. Held, the plaintiff could recover. Ellsworth, J., at page 31, said: "There are several views of the case, all of which lead to the same conclusion. In the first place, there was no sale, because the subject-matter had no existence. A sale is defined by Blackstone to be 'a transmission of property from one man to another, in consideration of some price or recompense, there must be a *quid pro quo*.' Parsons, in his work on Contracts,[1] says, an exchange is giving one thing for another thing, while a sale is the giving one thing for that which is the representative of all things. He goes on to say that the existence of the thing to be sold, or the subject-matter of the contract, is essential to the validity of the contract. If a horse, which has died, a fact unknown by both the parties, is sold at the present time, or goods which have been burned, the sale is not good, for the very basis of the negotiation and transfer is wanting. Indeed, it is clear law that, if a substantial part of the thing sold be non-existent, there is no sale. Chancellor Kent, in his Commentaries,[2] says that

[1] Vol. i. p. 436.

[2] 2 Kent's Com., sec. 39, p. 469.

in such a case the buyer has his option to rescind the sale. This is the law in the Code Napoleon.[1] . . . In some of the cases[2] . . . it is said that where there is a mutual mistake of fact, there is not a sale, because there is a failure of consideration; in others, because there is an implied warranty of genuineness, or of kind and description; and still in others, because the thing is not in existence; but the true idea is, as I think, that if the thing contracted for is essentially non-existent, there is nothing to sell and transfer, no subject-matter for an intelligent and perfect understanding between the parties. The parties may undoubtedly bind themselves by express agreement as they please, but where the thing intended to be sold and transferred does not exist, as if the horse be dead, the ship lost, the goods burnt, or the instrument forged, there can be no sale, unless we adopt a new definition of that legal term."

§ 88. The same view, in respect to this point, is expressed by Benjamin, in his excellent work on Sales.[3] In speaking of the authorities, on the subject of the existence of the thing sold, he says, at page 94: These cases are sometimes treated in the

[1] See § 1658.

[2] *I. e.*, quoted by the court as applicable to the point at issue.

[3] Vol. i., third English edition, by Pearson & Boyd, and fourth American edition, by Corbin (1883). First English edition, 1868.

decisions as dependent on an implied warranty by the vendor of the existence of the thing sold; sometimes, on the want of consideration for the purchaser's agreement to pay the price. Another, and perhaps the true ground, is rather that there has been no contract at all, for the assent of the parties being founded on a mutual mistake of fact, was really no assent, there was no subject-matter for a contract, and the contract, therefore, never was completed. This was the principle applied by Lord Kenyon, in a case where a leasehold interest, which the buyer agreed to purchase, turned out to be for six years, instead of eight and a half; and where he held the contract void, as founded on a mistake in the thing sold, the buyer never having agreed to purchase a less term than that offered by the vendor.[1] This is also the opinion of the civilians. Pothier[2] says: "There must be a thing sold, which forms the subject of the contract. If, then, ignorant of the death of my horse, I sell it, there is no sale, for want of a thing sold. For the same reason, if, when we are together in Paris, I sell you my house at Orleans, both being ignorant that it has been wholly or in great part burnt down, the contract is null, because the house, which was the subject of it, did not exist;

[1] Farrar *v.* Nightingale, 2 Esp. 639.

[2] Contrat de Vente, No. 4.

the site, and what is left of the house, are not the subject of our bargain, but only the remainder of it." And the French Civil Code, art. 1109, is in these words: "There is no valid assent, where assent has been *given by mistake*, extorted by violence, or surprised by fraud."

## SECTION II. THE IMPLIED CONDITION OF IDENTITY OR GENUINESS IN A SALE BY DESCRIPTION.

### I.. *Sale of Goods or Merchandise.*

#### *a. The Rule in England, and in some of the United States.*

§ 89. Where goods are sold by any description or particular designation, there is always an implied condition that the article delivered shall correspond strictly with that description or designation. In England, and by certain judges in the United States, this is considered as a condition precedent; but in America, usually, it is treated as an implied warranty of identity or genuineness. That it is a condition, and not a warranty, however, is very clear. A warranty is an express or implied statement of something, with respect to the article sold, which the seller undertakes shall be part of a contract of sale, though collateral to the express object of it. Now, if I buy a horse,

and the seller delivers me a sheep, this is a breach of the contract of sale, for one of the obvious conditions in a sale is, that I have a right to what I bargain for, and in this case I don't get what I bargained for; but this is not a breach of warranty, for the seller never affirmed that the sheep was a horse: but if he has given a warranty at all, it was a statement in respect to the subject-matter of the sale, the horse; and as the horse is not delivered, the question of warranty cannot arise. Besides, as one of the conditions in a sale is, that the seller shall deliver what he agreed to, how absurd it would be to exact a collateral and additional agreement from the seller, to compel him to do precisely what he was bound to do by the original undertaking. It should be observed, however, that under different circumstances, the same representations or affirmations, in respect to the quality or condition of the thing sold, are susceptible of being treated, either as a condition precedent, or as a collateral contract of warranty; and this depends upon whether there is a bargain and sale between the parties, or merely an executory agreement, and the rule might be stated somewhat as follows: where an affirmation is made by a party in a contract, and intended to be a substantive part of it, affirming some quality, or representing some material incident, in respect to the thing sold, it may be regarded,

in an executory agreement as a condition, on the failure or non-performance of which the other party may, if he choose, repudiate the contract *in toto*, provided it has not been partially executed in his favor. But, if he has received the whole, or any substantial part of the consideration for the promise on his part, and consequently the contract has become totally or in part executed, the representation ceases to be a condition, but becomes a warranty, for the breach of which an action lies in damages. Thus, where an ascertained specific chattel has been sold, so that the property passes by the sale, with a warranty of quality, the buyer, having become the proprietor of it, cannot treat the warranty as a condition, and rescind the sale, but must sue for the breach of it. But where the thing sold is not ascertained or specific, and the title does not pass by the sale, the buyer may treat the warranty or representation as a condition, and repudiate the contract for non-performance thereof. Illustrations of these principles are had in the warranties of title, in sales by sample, etc., in which the seller is allowed, in an executory contract, to repudiate the sale, provided the seller's title to the thing sold is defective, or provided the goods delivered do not correspond with the sample, etc.; but where the contract is executed, and the title has passed, the buyer can only sue for breach of

the warranty of title, or non-correspondence of the goods with the sample, etc.[1] In short, perhaps, it would not be incorrect to term a warranty, an independent stipulation in a contract of sale, which, in an executory contract, describing an attribute or quality of the thing sold, whose title is to vest in the buyer when the sale is executed, is susceptible of becoming a condition precedent to the vesting of the title; but, which, in an executed contract, describing a condition or quality of the thing sold, whose title passes to the buyer by the sale, becomes a warranty or guaranty that the thing sold is in the condition, or possesses the quality, affirmed by the seller.[2]

§ 90. In Reed *v.* Randall,[3] Wright, J., in a lengthy opinion, took the distinction between a condition and a warranty. The case was an action for the breach of a contract to sell and deliver a crop of tobacco growing on the land of the defendant. The contract called for good tobacco, well cured, and boxed in good condition—and when delivered it was bad, ill cured, shrunk, rotten, and sweaty. The plaintiffs accepted the tobacco, and retained it without notifying the defendants of its defects, and, seventeen months

[1] See Behn *v.* Burness, 3 B. & S. 751.

[2] See *infra*, Remedies, §§ 293 and 311.

[3] 29 N. Y., 358.

after converting it, brought an action for breach of contract. The court held the action not to lie, as there was no warranty, and no offer to return by the vendee, and besides, evidence of an intention to accept, etc. At page 361, however, Wright, J., said: "The stipulation in respect to the quality and condition of the article, when delivered, constituted no express warranty. The contract was executory, for the sale of a growing crop of tobacco, to be delivered the spring following, well cured, and in good condition. The article bargained for, and to be furnished in the future, was a *merchantable* crop of tobacco. This was what the vendor agreed to sell, and the vendee to purchase. It was the sale of a particular thing by its proper description merely; and the descriptive words, used for defining the thing agreed to be sold, were of the substance of the contract, not collateral to the main object of it. . . . A warranty, then, cannot be predicated upon the contract alleged in the complaint; and the rules of law by which the rights of the parties in respect to warranties are regulated are inapplicable. A breach of the contract was not a *breach of warranty*, but a *mere non-compliance with the contract* that the defendant had agreed to fulfil. . . . The delivery of property corresponding with the contract is a condition precedent to the vest-

ing of the title in the vendee. The parties understand that the vendee is not bound to accept the property tendered, except upon this condition."[1]

§ 91. And, in Chanter *v.* Hopkins,[2] Lord Abinger, remarked that: "A good deal of confusion has arisen in many of the cases upon this subject, from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be part of a contract, and, though part of the contract, *collateral to the express object of it.* But in many of the cases, the circumstance of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract, a breach of warranty; but it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the *contract* is to sell him peas, and if he sells him anything else in their stead it is a non-performance of it."

[1] See, also, Wolcott *v.* Mount, 7 Vr. (N. J.) 262, remarks of Depue, J., at page 267.

[2] 4 M. & W., 399. See, also, Taylor *v.* Bullen, 5 Ex. 779.

§ 92. The following are illustrations of the general doctrine in England upon this point.[1]

§ 93. In Shepherd *v.* Kain,[2] a vessel was advertised for sale, as "copper-fastened vessel," taken with "all faults," "without allowance for any defects whatever." She turned out to be only partially copper-fastened, and not what in the trade would be termed a copper-fastened vessel. Held, the words "with all faults" meant all faults which a vessel might have consistently with its being the thing described, that is, a copper-fastened vessel.[3]

§ 94. So in Massachusetts, in Whitney *v.* Boardman,[4] a lot of Cawnpore hides were sold; "hides to be taken, *all faults.*" The hides when delivered to the defendants, having been injured from bad curing, packing, etc., were refused, and plaintiffs sold them and sued defendants for the difference between the contract price and the price realized from the sale. Defendants insisted that they were entitled to receive Cawnpore hides, properly cured, packed, etc., and contended that the words "*all faults,*" merely referred to such faults as

[1] The English cases are, in the main, taken from the Treatise on Sales, by Mr. Benjamin, and from the work of Mr. W. W. Story on Sales.

[2] 5 B. & A., 240; Kain *v.* Old, 2 B. & C. 627.

[3] 3 Q. B. D., 150.

[4] 118 Mass., 242.

hides usually have, but not to such an extent as by any possibility they might have; while, on the part of the plaintiffs, it was maintained that a delivery of any goods known in the market as Cawnpore hides was sufficient, no matter what faults they possessed. Held, the plaintiffs were entitled to recover. Devens, J., said: "The phrase '*with all faults*' cannot be limited, as the defendants contend, 'to all such faults or defects as the thing described ordinarily has. That would be to deprive it of force entirely. Its meaning is such faults as the article sold might have, retaining still its character and identity as the article described." And Shepherd *v.* Kain was cited with approval.

§ 95. In Ward *v.* Hobbs,[1] a party sold a lot of pigs at the Newbury market, with the statement that the purchaser must take them with "all faults," and that he would not warrant them. The pigs were proved to have been affected with a contagious disease, and all but one subsequently died; and there was some evidence that the vendor knew of this fact. There was a statute prohibiting persons from sending animals affected with any contagious diseases to market. Held, in the House of Lords (affirming the Court of Appeal,[2] which had reversed a judgment of the Queen's

[1] L. R., 4 A. C., 13.

[2] L. R. 3 Q. B. D., 150.

Bench[1]), that the statement that the purchaser must take the article "with all faults," and that the vendor would not warrant, relieved the seller from any liability in respect of any defect of quality in the thing sold; and that, while a man may be morally, and under the act of Parliament legally, culpable and guilty of a public offence, in sending pigs to market known to be affected with a contagious disease, still that did not amount by implication to a representation that they were sound. Lord Selborne said: "The very nature of the condition that the buyer is to take the animals 'with all faults,' implies that they may be diseased, without any distinction between infectious and non-infectious disease, and I cannot think that the legislation which has recently taken place in the public interest against particular acts tending to propagate such disease, can make that an actionable wrong, as between the parties to a private contract, which would not be so without it." The Chancellor, Earl Cairns, however, observed: "If a man expressly states upon a sale, that he gives no warranty, and that the goods sold must be taken with all their faults, *but if he goes on expressly to say, in addition to that,* that so far as he knows or believes, or *has reason to believe, the goods are free from any particular fault* . . . and if *it can after-*

[1] L. R. 2 Q. B. D., 331.

*wards be proved that to his knowledge the animals were tainted with the disease* to which he *referred*, then there can be no doubt that, notwithstanding the negation of warranty, an action would lie for the deceit for the false representation."

§ 96. In Allen *v.* Lake,[1] the sale was of turnip seeds, described as "Skirving's Swedes," and it was held not to be a warranty, but a sale of goods by description.[2]

§ 97. In Bridge *v.* Wain,[3] the sale was of "Scarlet cuttings," an article known in the market as peculiar to the China trade, and no express warranty was proved. In an action for the breach of warranty, Lord Ellenborough held that if the goods were sold by the name of "Scarlet cuttings," and were so described in the invoice, an undertaking that they were such must be inferred.

§ 98. In Edgar *et al. v.* Canadian Oil Co.,[4] the defendants, dealers at Woodstock, contracted to sell 6000 gallons of "rock oil," to be delivered to plaintiffs at Hamilton, the oil being at the time of

[1] 18 Q. B., 560.

[2] See, also, Hutchison *v.* Bowker, 5 M. & W. 535: Wieler *v.* Schilizzi, 17 C. B. 619.

[3] 1 Stark, 410. In this case Lord Ellenborough said, "a *warranty* is implied that they were that, for which they were sold." He probably alluded to the warranty of merchantability implied in a sale by description, not to the condition of identity.

[4] 23 U. C. Q. B., 333.

the sale at Woodstock, and plaintiffs sent the barrels to Woodstock to be filled. It was proved that "rock oil" meant oil so refined as to be fit for illuminating purposes; but the oil delivered proved to be unfit, and even dangerous for ordinary use as illuminating oil. The plaintiffs contended this was not "rock oil," and, therefore, there was a breach of contract, and Richards, C. J., charged the jury, *inter alia*, that if they were not satisfied that this oil was substantially that which was known in commerce as "rock oil," to find for the plaintiffs, but if it was the article generally known as "rock oil," though it might not have been of as good a quality as the Woodstock Company formerly furnished, to find for defendants. There was a verdict for the plaintiffs, and, on appeal, this was affirmed; Draper, C. J., saying, "'rock oil' seems to be defined 'as earth oil which has been subjected to a refining process by which it is made fit to be safely used in lamps, or, in other words, as an illuminating oil. If so, the defendants contracted to sell such oil to the plaintiffs. Then, was the contract fulfilled? The jury have decided that it was not, and we think the evidence amply warrants the conclusion that the oil received by the plaintiffs was not fit for use as illuminating oil, for it was explosive and dangerous, and in its then state unmarketable as 'rock oil.'" Wieler *v.* Schilizzi,[1]

[1] 17 C. B., 619.

Nichol *v.* Godts,[1] Hopkins *v.* Hitchcock,[2] were approvingly quoted.

§ 99. In Bannerman *v.* White,[3] in a sale of hops, the buyers, at the time of the sale inquired, before asking the price, if sulphur had been used in their growth, which would have injured their quality, and received the answer, "No." The goods were then sold by sample; but rejected on the discovery that sulphur actually had been used. It was admitted the purchaser would not have bought if he had known the use of the sulphur. The jury found there was no fraud, but that the affirmation in respect to the sulphur was intended to be part of the contract of sale. Held, the conditions of the sale were not complied with, and consequently that plaintiff could not enforce the sale.

§ 100. In Azémar *v.* Casella,[4] cotton was sold, through the plaintiff, and the contract ran: "Sold by order and for account of Messrs. J. C. Azémar & Co., to Messrs. A. Casella & Co., the following cotton, viz., *D. C.* 128 bales at 25*d.* per pound, expected to arrive in London, per Cheviot, from Madras. The cotton guaranteed equal to sample in our possession. . . . Should the quality prove inferior to the guarantee, a fair allowance to be

[1] 10 Ex., 191.
[2] 9 Jur. N. S., 896.
[3] 10 C. B. N. S., 844.
[4] 36 L. J. C. P., 124; L. R. 2 P. C., 431.

made." The sample was of "Long Staple Salem," and the delivery was of "Western Madras," and admittedly, the Western Madras cotton was inferior to the Long Staple Salem, and required different machinery for its manufacture. Held, the two commodities were distinct, and that there was a condition precedent and not a simple warranty, and therefore defendant was not bound to accept.[1]

§ 101. In Barr *v.* Gibson,[2] on October 21, 1866, the defendant sold to plaintiff "all that ship or vessel called the Sarah, of Newcastle," etc., and covenanted that he "had good right, full power, and lawful authority to sell." It afterwards appeared that the ship had got ashore eight days before the sale, on the Prince of Wales Island; and on a survey on the 14th of October it had been recommended to sell her as she lay, as she could not be got off so as to be repaired there, for the want of proper local facilities, but elsewhere, she could easily have been got off and repaired. The jury found that the article was not a ship but a mere mass of timber. On a rule for a new trial, which was granted, Parke, B., said: "In the bargain and sale of an existing chattel by which the property passes, the law does not, in the absence

[1] See, also, Hopkins *v.* Hitchcock, 14 C. B. N. S. 65; Nichol *v.* Godts, 10 Ex. 191.

[2] 3 M. & W., 390.

of fraud, imply any warranty of the good quality or condition of the chattel so sold. The simple bargain and sale of the ship, therefore, does not imply a contract that it is then seaworthy or in a serviceable condition. . . . But the bargain and sale of a chattel, as being of a particular description, does imply a contract that the article sold is of that description, and, therefore, the sale in this case of a ship implies a condition that the subject of the transfer did exist in the character of a ship; and the express covenant that the defendant had power to make the bargain and sale of the subject before mentioned, must operate as an express covenant to the same effect. That covenant, therefore, was broken if the subject of the transfer had been, at the time of the covenant, physically destroyed, or had ceased to answer the designation of a ship; but if it still bore that character there was no breach of the covenant in question, although the ship was damaged, unseaworthy, or incapable of being beneficially employed. The contract is for the sale of the subject absolutely, and not with reference to collateral circumstances. . . . We are of opinion, upon the evidence given on the trial, that the ship did continue to be capable of being transferred as such at the time of the conveyance, though she might be totally lost within the meaning of a contract of insurance, . . . the subject of

the transfer had the form and structure of a ship, although on shore, with the *possibility* though not the *probability* of being got of."[1]

§ 102. In Josling *v.* Kingsford,[2] where the sale was of "oxalic acid," which was in great part examined by the buyer, but which contained defects, only discoverable on analysis, from an admixture of other chemicals, the seller was held bound to deliver an article of the strength which would pass in the trade under the denomination of "oxalic acid," though the seller had declined to warrant the article, and suggested a fresh examination on the buyer's part.[3]

*b. The Rule in the United States, in General.*

§ 103. In the United States, the courts, in some cases, have adopted the same rule as the courts of England. As, for example, in Reed *v.* Randall,[4] already adverted to, the defendants had contracted to deliver to plaintiffs a crop of tobacco, well cured,

[1] See, also, Schnieder *v.* Heath, 3 Camp. 506; Baglehole *v.* Walters, 3 ib. 154; Mellish *v.* Motteaux, Peake's Cases, 156, as to how far the seller is bound to disclose latent defects he is cognizant of.

[2] 13 C. B. N. S., 447.

[3] With respect to books, maps, etc., sold by prospectuses, see Paton *v.* Duncan, 3 C. & P. 336; Teesdale *v.* Anderson, 4 C. & P. 198.

[4] 29 N. Y., 358.

boxed, and in good condition, but actually delivered the tobacco wet, sweaty, rotten, and shrunk. The plaintiffs received the tobacco, and after retaining it a year and a half without complaint or offer to return, brought an action for damages. Held, the action would not lie, since the retention by the plaintiffs for so long a time was a virtual acceptance, and admission on his part that the contract had been performed, as he had had ample time for ascertaining the condition and quality of the article sold. Held, also, that "*the stipulation in respect to the quality and condition of the article when delivered, constituted, no express warranty, . . . but a mere non-compliance with the contract that the defendant had agreed to fulfil.*"

§ 104. Usually, however, the cases on this point are put on the ground of an implied warranty, of identity or genuiness, though I am not aware that the principle of condition precedent has ever been denied, or that the distinction between the two has ever been much discussed. This, however, is not considered as taking away from the buyer the right to reject the goods and sue for breach of contract, or to rescind; but the buyer has the treble remedy, of rejecting the goods, and rescinding or suing for breach of contract, or of retaining them and suing on the warranty. This is somewhat anomalous, but has been approved by our judges as af-

fording "*the purchaser a more enlarged remedy* . . . than he would *have on a simple warranty.*"[1]

§ 105. The doctrine of the two countries was carefully considered in Wolcott *v.* Mount,[2] in which case, certain seed stated to be "early strap-leafed red-top turnip seed" was sold; but after delivery was found to be of another kind, and of inferior quality. There was admittedly no fraud, and the difference in the seed could not be detected on ordinary inspection. Held, if the statement by the seller was part of the contract (as in fact found), and not mere matter of description, the action lay for breach of contract. Depue, J., said: "In the later English cases some criticism has been made upon the application of the term warranty to representations in contracts of sale, descriptive of articles which are known in the market by such description, per Lord Abinger in Chanter *v.* Hopkins;[3] per Erle, C. J., in Bannerman *v.* White.[4] But in a number of instances it has been held that statements descriptive of the subject-matter, if intended as a substantive part of the contract, will be regarded in the first instance as conditions, on the failure of which the other party may repudiate *in toto*, by a refusal to accept or return of the arti-

[1] Per Depue, J., in Woolcott *v.* Mount, 7 Vr. (N. J.), 262.

[2] *Supra.* [3] 4 M. & W., 404. [4] 10 C. B. N. S., 844.

cle, if that be practicable, or if part of the consideration has been received, and recission therefor has become impossible, such representations change their character as conditions, and become warranties, for the breach of which an action will lie to recover damages. The rule of law is thus stated by Williams, J., in Behn *v.* Burness,[1] as established on principle, and sustained by authority. . . . The doctrine that on a sale of a chattel, as being of a particular kind or description, a contract is implied that the article sold is of that kind or description, is also sustained by the following English cases: Powell *v.* Horton,[2] Barr *v.* Gibson,[3] Chanter *v.* Hopkins,[4] Nichol *v.* Godts,[5] Gompertz *v.* Bartlett,[6] Azémar *v.* Casella,[7] and has been approved by some decisions in this country.[8] The right to repudiate the purchase, for the non-conformity of the article delivered to the description under which it was sold, is universally conceded. That right is founded on the engagement of the vendor, by such description, that the article deliv-

[1] 3 B. & S., 755.
[2] 2 Bing. N. C., 668.
[3] 3 M. & W., 390.
[4] *Supra.*
[5] 10 Exch., 191.
[6] 2 E. & B., 849.
[7] L. R. 2 C. P., 431.
[8] Henshaw *v.* Robins, 9 Met. (Mass.) 83; Borrekins *v.* Bevan, 3 Rawle, (Pa.) 23; Osgood *v.* Lewis, 2 H. & G. (Md.) 495; Hawkins *v.* Pemberton, 51 N. Y. 198.

ered shall correspond with the description. The obligation rests upon the contract. Substantially, the description is warranted. It will comport with sound legal principles to treat such engagements as conditions, in order to afford the purchaser a more enlarged remedy by recission than he would have on a simple warranty; but when his situation has been changed, and the remedy by repudiation has become impossible, no reason, supported by principle, can be adduced, why he should not have upon his contract such redress as is practicable under the circumstances. In that situation of affairs the only available means of redress is a legal action for damages. Whether the action shall be technically considered an action on a warranty, or an action for the non-performance of a contract, is entirely immaterial."[1]

§ 106. The following cases are examples of the American decisions on this point:—

§ 107. In the early case of Seixas *v.* Woods[2] [1804], a contract was made for the delivery of "braziletto wood," and it was so advertised and described in the invoice. A delivery was made of an article known as "peachum wood," much inferior in quality. There was no evidence of fraud or an express warranty, and it was held that an

[1] See Fox *v.* Everson, 27 Hun (N. Y.), 355.

[2] 2 Caines (N. Y.), 48.

action on the case would not lie, "for selling one wood for the other." Kent, Chancellor, said: "If upon a sale there be neither warranty nor *deceit*, the purchaser purchases at his peril. . . . The mentioning the wood as *braziletto* wood in the bill of parcels, and in the advertisement some days previous to the sale, did not amount to a warranty to the plaintiffs. To make an affirmation at the time of the sale a warranty, it must appear by the evidence to be so *intended*, and not to have been a mere matter of judgment or opinion, and of which the defendant had no particular knowledge. Here it is admitted the defendant was equally ignorant with the plaintiffs, and could have had no such intention." So, in Swett *v.* Colgate[1] [1822], goods were sent from England to Boston, invoiced as *barilla; barilla* being a substance found in the Mediterranean Sea, near there manufactured, and containing soda or alkali, which is its only value, being used in the manufacture of soap. On using part of the so-called *barilla*, it was found to be a substance called *kelp*, which greatly resembles *barilla*, but contains a very small quantity of alkali. *Kelp* is made in Great Britain, and cannot be distinguished from *barilla*, but by analysis. *Barilla* contains fifty per cent. of alkali, and *kelp* but five

[1] 20 John. (N. Y.), 196.

per cent. Assumpsit was brought for goods sold and delivered, and the court held the action would lie, there being no express warranty or fraud. Woodworth, J., said: "By the common law, where there is no fraud or agreement to the contrary, if the article turns out not to be that which it was supposed, the purchaser sustains the loss; the rule is *caveat emptor*," and followed Seixas *v.* Woods, with approval.

§ 108. It is submitted, however, that the law in Seixas *v.* Woods, was incorrectly applied to that case, as well as to the case just referred to, and Kent, Chancellor, who delivered the opinion in Seixas *v.* Wood, expresses a doubt, in his Commentaries, whether the maxim of *caveat emptor* was there correctly stated, inasmuch as there was a description in writing of the article sold; and we may add the doctrine of Seixas *v.* Woods, *supra*, and Swett *v.* Colgate, *supra*, has since frequently been doubted in New York; see Hawkins *v.* Pemberton,[1] Dounce *v.* Dow,[2] and finally overruled in White *v.* Miller.[3] In the last case, plaintiffs, being gardeners, purchased of defendants, for market cabbage, a certain variety of seed known as "Large Bristol Cabbage." The seed sent was raised on "Bristol cabbage stocks," and being of

[1] 51 N. Y., 198. [2] 64 N. Y., 411. [3] 71 N. Y., 129.

a different character, was rendered impure by the crossing of the varieties, and the plants raised were worthless. Held, an action lay for breach of contract, as there was an implied stipulation that the seller would deliver identically what he had contracted to sell, which he had not done. Andrews, J., said: "The doctrine that a bargain and sale of a chattel of a particular description, imports a contract or warranty that the article is of that description, is sustained by a great mass of authority. The cases of Seixas *v.* Woods, and Swett *v.* Colgate, based mainly upon the authority of the case of Chandelor *v.* Lopus,[1] are, it must be admitted, adverse to this view. The case of Chandelor *v.* Lopus[2] has been overruled in England, and the cases in this State referred to have often been questioned; and Chancellor Kent, who took part in deciding Seixas *v.* Woods, intimates in his Commentaries a doubt whether the case was correctly decided.[3] The case of Hawkins *v.* Pemberton[4] adopts as the law of this State the doctrine upon this subject now prevailing elsewhere, that a sale of a chattel by a particular description is a warranty that the article sold is of the kind specified; and this case was recognized in Dounce *v.* Dow,[5] as modifying the doctrine of Seixas *v.* Woods,

[1] Cro. Jac., 4. [2] See *infra*, Chapter V., Remedies, § 286.
[3] 2 Kent. Com., 479. [4] *Supra.* [5] *Supra.*

and Swett *v.* Colgate. We think the modern doctrine upon the subject is reasonable, and proceeds upon a just interpretation of the contract of sale."

§ 109. In Winsor *v.* Lombard,[1] a number of barrels of mackerel, branded, under the inspection laws, as No. 1 and No. 2 mackerel, were sold and so described in the bill of parcels. The sale was in the spring and the inspection takes place in the autumn. There was evidence to show that the fish were injured by rust, which is caused by the leaking out of the pickle, after the fish have been packed, inspected, and branded; and that fish deteriorated by rust are still merchantable, though never marked by the inspector as No. 1 or 2, but pass as No. 3. The court instructed the jury that though the fish had been properly inspected, etc., there was an implied warranty that the fish should not have deteriorated between the time of the inspection and the time of the sale; and, therefore, if the jury were of the opinion that the fish were damaged by rust occasioned by causes originating after the inspection, they should find for the plaintiff. A new trial was granted, Shaw, C. J., saying: "The old rule upon this subject was well settled, that upon a sale of goods, if there be no express warranty of the quality of the goods sold, and no actual fraud, by a wilful misrepre-

[1] 18 Pick. (Mass.), 59.

sentation, the maxim, *caveat emptor*, applies without going at large into the doctrine upon this subject or attempting to reconcile all the cases, which would certainly be very difficult; it may be sufficient to say that, in this Commonwealth, the law has undergone some modifications, and it is now held, that without express warranty or actual fraud, every person who sells goods of a certain denomination or description undertakes, as part of his contract, that the thing delivered corresponds to the description, and is in fact an article of the *species, kind, and quality* thus expressed in the contract of sale.[1] . . . The rule being, that upon a sale of goods by a written memorandum or bill of parcels, the vendor undertakes, in the nature of warranting, that the thing sold and delivered is that which is described, this rule applies whether the description be more or less particular and exact in enumerating the qualities of the goods sold. In applying this to the present case . . . what did the parties mutually understand by their contract? . . . In the sale of the mackerel, both parties must be presumed to be acquainted with the inspection laws, both must be understood to know the season of the year when this species of fish are caught, packed, and branded, and the species of damage

[1] Hastings *v.* Lovering, 2 Pick. (Mass.) 214; Hogins *v.* Plympton, 11 ib. 97.

and deterioration to which they are liable, and that if mackerel are sold in the spring, they cannot be of an inspection more recent than that of the preceding autumn. With these circumstances mutually understood, we have no doubt that when these fish were sold as Nos. 1 and 2, the understanding of the parties was, that they were fish packed, inspected, and branded as of these numbers respectively. . . . Then, as there was no express warranty of their actual condition, or of the manner in which they were kept and taken care of after the inspection, and from that time to the sale; and, as there was no description embracing these particulars, it must be presumed that both parties relied upon the faith of the inspection and brand, . . . the action cannot be supported."

§ 110. In Hastings *v.* Lovering,[1] the words "sold A. 2000 gallons prime quality winter oil," were held to amount to a warranty that the oil was of the *quality* as described.

§ 111. In Henshaw *v.* Robins,[2] the bill of sale described a sale, *inter alia*, of "two cases of manilla indigo, of superior quality," previous to the sale the goods being opened and inspected. Held, the bill of sale might be considered as a warranty

[1] 2 Pick. (Mass.), 214; see Higgins *v.* Livermore, 14 Mass. R. 106.

[2] 9 Metc. (Mass.), 83.

that the goods sold were as described in it, and this whether the goods were inspected or not by the buyer, provided he could not tell on ordinary inspection their quality and character. Wilde, J., said: "The plaintiff, therefore, is entitled to recover, unless, by the examination of the article purchased, he is to be considered as having waived his right to indemnity under the warranty. . . . But we are of opinion that *the examination of the article by the plaintiff, at the time of the sale, is no evidence of his intention to waive any legal right. If the spurious nature of the article might have been detected on inspection, it might have been otherwise.*" Osgood *v.* Lewis,[1] Hastings *v.* Lovering,[2] Borrekins *v.* Bevan,[3] were cited, with approval; and Seixas *v.* Woods,[4] and Swett *v.* Colgate,[5] were commented on.

§ 112. In Osgood *v.* Lewis,[6] the sale was of oil described in the bill of parcels as "winter-pressed sperm oil," but on delivery it turned out to be "summer-pressed," and not "winter-pressed," and inferior to the former. On appeal, it was held that an action lay for a breach of the contract; here Seixas *v.* Woods, and Swett *v.* Colgate,[7] were disapproved.

[1] 2 H. & G. (Md.), 495.
[2] 2 Pick. (Mass.), 214.
[3] 3 R. (Pa.), 23.
[4] 2 Caines (N. Y.), 48.
[5] 20 John. (N. Y.), 196.
[6] 2 H. & G. (Md.), 495.
[7] *Supra.*

§ 113. In Foos *v.* Sabin,[1] the contract of sale was for "fat cattle," to be shipped for delivery at a future day. Held, where a party contracts for "fat cattle," to be shipped to market at a future day, the seller will be bound to pasture them, etc., so that they will, at the expiration of the time agreed on for delivery, be in a suitable condition for sale in the market as "fat cattle."

§ 114. In Flint *v.* Lyon,[2] there was a contract to deliver 2000 barrels, described in the sold note as "Haxall flour," and it was alleged to have been performed by a delivery of "Gallego flour." Apparently there was no great difference between the values of the two kinds at that time. Held, an action lay for breach of contract. Murray, J., said: "It is a matter of no consequence that there was at the time little or no difference between the prices of Haxall and Gallego flour. What the inducement was to the defendant to purchase we know not; but having purchased that particular brand, he was entitled to it, and could not be compelled to accept any other as a substitute. The use of the word 'Haxall' in the sold note amounted to a warranty that the flour was 'Haxall.'"

§ 115. In Hardy *et al. v.* Fairbanks *et al.*,[3] it was held that the sale of No. 1 salmon, without

[1] 84 Ill., 564. [2] 4 Cal., 17. [3] James (Nova Scotia), 432.

express warranty, amounts to a warranty that the fish is in the condition prescribed by law for the fish of that brand."[1]

§ 116. In Baker *et al. v.* Lyman,[2] an order was sent by plaintiffs, potters, in England, to the defendants, at Toronto, for "stone spar such as potters use." The order was entered on the books for stone, but defendant's manager erased it, and put "ground flint," thinking that was what was meant. It appeared that spar was used in the United States for the same purposes as the stone in England. The flint was sent in a barrel, and said by defendants to be marked "one barrel flint," but, at all events, was entered by a station master in England as "one barrel fluid." There was nothing to distinguish the flint from the stone on mere inspection, and plaintiffs, using it, thereby suffered a loss in their ware. In an action by them, the court below directed the jury that defendants were liable if the order sent by plaintiffs should have been understood by defendants as an order for stone, and if the plaintiffs were justified in believing that the article sent was such stone; but that if defendants were justified in sending ground flint on the order received, they were not liable. The jury found for the plaintiffs. A nonsuit was afterwards ordered, but on appeal

[1] See Adams *v.* Rogers, 9 Watts (Pa.), 121. [2] 38 U. C. Q. B., 498.

it was held the direction to the jury was right, and that the verdict should have been upheld.

*c. The Rule in Pennsylvania.*

§ 117. The rule in Pennsylvania is said by the courts to be, that in a sale by description, the seller is impliedly bound to deliver an article of the same *species* as that contained in the order; but it is impossible to reconcile the cases, and they here are given at some length.

§ 118. The earliest case, we are aware of, is that of Ritchie *v.* Summers[1] [1803], where it was unanimously held, on a special verdict, that the money paid for a note with a forged indorsement to an innocent seller can be recovered back, *without a tender of the note.* Yeates, J., observed: "Here the plaintiff has contracted for one thing, and has received another. He may justly exclaim, *non haec in fœdera veni.* It is the vital principle in contracts, that each party shall perform those things which he ought to do. Failing essentially herein, the other party is discharged." And Smith, J., said: "The note is not what the defendants sold it for, and, therefore, the money was paid by mistake, and the consideration has totally failed." On appeal the judgment was reversed, on

[1] 3 Yeates (Pa.), 531.

the ground of the want of tender back of the note, the court declining to express any opinion on the other point adverted to.[1]

§ 119. Curcier *et al. v.* Pennock,[2] decided in 1826, does not afford a very luminous view of the law, as each judge in the Court of Appeal appeared to entertain a different opinion of the law applicable to the case upon this point. Here, the defendant offered plaintiffs a quantity of coin, believing it to be genuine "Cayenne currency," for a lot of goods. Plaintiffs asked for time to ascertain its value, and took some away as a sample, after which they took the coin and delivered the goods. Three years after, the coin was found to be spurious, and on an action for goods sold, etc., without a tender of the coin, the court below charged the jury, *inter alia*, that there had been a substantial fulfilment of the contract, as plaintiffs had the same opportunity to examine the commodity as defendant, and there was no allegation of fraud, or warranty that the coin was genuine. Besides there had been no tender back of the goods, as well as an unreasonable delay before suit. On appeal, the judgment for defendant was reversed on other grounds. Tilghman, C. J., considered, however, that the three years' delay was

[1] See 30 Pa. St., 147, note.

[2] 14 S. & R. (Pa.), 51.

unreasonable, and that probably there should have been a retender, but did not pass upon the point of our discussion." Gibson, J., thought, that anyhow in such a case, without fraud or warranty, there should be no recovery. But Duncan, J., said: "Without any particular warranty, there is an implied one in every such contract, that is, that description is sufficient evidence of warranty. The plaintiffs had a right to expect a passable article, answering the description of Cayenne money—a thing that would pass in the Cayenne market as money."

§ 120. Then came the leading case of Borrekins *v.* Bevan.[1] It appeared that defendants had contracted to sell to the plaintiffs, *inter alia*, some casks of "blue paint," and the bill of sale offered in evidence ran: "Bought of Bevan & Porter, 4 casks paint, viz: 1 cask blue, wt.," etc.; the paint was delivered, and about a year afterwards was opened and found to be a different article, and not merchantable as blue paint. On an action to recover back the purchase-money, the lower court charged the jury that the plaintiff could not recover, unless an express warranty or fraud were proven; that a description in a bill of parcels of an article sold, as *blue paint*, does not amount to

[1] 3 Rawle (Pa.), 23.

a warranty that it is so; and that in order to support his action, it is incumbent on the plaintiff to show, that before bringing suit, he tendered or redelivered the article to the defendants. After the case had been elaborately argued on appeal, the court below was reversed, Rogers, J., saying: "According to the modern cases, warranties are divided into two kinds; express warranties, where there is a direct stipulation, or something equivalent to it, and implied warranties, which are conclusions and inferences of law, from facts, which are admitted, or proved before the jury. If the learned judge intended to say, that there can be no warranty, without an express agreement or stipulation, or there be fraud, then his opinion is in opposition to the whole current of modern decisions. It must now be taken to be the law (for they have conceded this in England, and even in New York, where the cases of Chandelor *v.* Lopus[1] and Seixas *v.* Woods[2] were decided), that where property is sold by sample, there is an implied warranty that the article corresponds with the sample, although it has, at the same time, been held it is sufficient if the bulk corresponds with the sample. . . . From a critical examination of all the cases, it may be safely ruled, that a sample

[1] Cro. Jac., 4.

[2] *Supra.*

or description in a sale note, advertisement, bill of parcels, or invoice, is equivalent to an express warranty, that the goods are what they are described or represented to be by the vendor. In the absence of proof to rebut the presumption, it is of equal efficacy to charge the vendor, as if the seller had expressly said, 'I warrant them to correspond with the description or representation.' . . . To fix the precise meaning of the judge, in this part of the charge, has been attended with some difficulty. I understand him, in effect to say, that even if the defendants sold, and the plaintiffs purchased, the article for blue paint, it does not amount to a warranty if, on delivery, it turns out to be an entirely different commodity. . . . In all cases where it does not correspond in kind, the purchaser has a right to say this is not the article I contracted for, *non in haec fœdera veni*, and this, whether he complains at the time of delivery or after, unless his conduct amounts to a waiver of his right to indemnity. . . . As a general rule, I do not mean to impugn the doctrine, that in sales of personal property the vendor is not answerable for any defects in the quality of the article sold, without any express warranty or fraud. But it must be admitted that the rule is qualified with many exceptions, . . . in addition to those to which I have particularly adverted. . . .

It has been said that the doctrine only applies to executory contracts, but it will be observed that all the cases are actions on the implied warranty, where the contract has been executed, either at the time or afterwards, by payment of the money and delivery. . . . In all sales, therefore, there is an implied warranty that the article corresponds in specie with the commodity sold, unless there are some facts and circumstances existing in the cases, of which the jury under the direction of the court are to judge, which clearly show that the purchaser took upon himself the risk of determining not only the quality of the goods, but the kind he purchased, or where he may waive his right. . . . The court further instructed the jury that in order to support the action it is incumbent on the plaintiff to show that before bringing suit he tendered or redelivered the article to the defendants. If this had been an action to rescind there would be no doubt that the charge would have been right in this particular, and this was formerly so on an express warranty; but it has been since ruled an action will lie without a return or offer to return the property. And in this respect I see no difference between an express and implied warranty." In this case Swett *v.* Colgate, Seixas *v.* Woods, and Chandelor *v.* Lopus were disapproved. Gibson, C. J., and Kennedy, J., dissented. This

was followed by Jennings *v.* Gratz,[1] where plaintiffs, auctioneers, sold certain teas, a large proportion being described as "young hyson tea." On delivery, it was discovered that the tea was adulterated, and defendants declined to receive it. Held, that if the tea, by adulteration, had not lost *its distinctive character*, as "young hyson tea," an action lay for the price. The court said: "In the case at bar, the tea was proved to be adulterated with certain leaves, which, it is believed, do not belong to the tea family. But it was also shown that no teas of the same denomination are entirely free from adulteration by admixture of these same leaves; and if a small degree of adulteration were permitted to affect the question of specific character, there would seldom be a binding sale. . . . *Adulteration may, however, be carried so far as to destroy the distinctive character of the thing altogether; and in doubtful cases there is, perhaps, no practical test but that of its being merchantable under the denomination affixed to it by the seller.* The application of this test to the case at bar produces a result decisively unfavorable to the defendant."

§ 121. The principles laid down in Borrekins *v.* Bevan and Jennings *v.* Gratz are substantially in accord with the cases in the other States upon this question.

[1] 3 Rawle (Pa.), 168.

§ 122. In Kirk *v.* Nice,[1] however, a departure was taken, and it was held that a contract calling for bar iron of "Centre County metal" would be satisfied by a delivery of iron, Centre County metal, which was not of a good and merchantable quality, but, on the contrary, positively bad and unmerchantable. Kirk *v.* Nice was followed by Fraley *v.* Bispham,[2] affirming a somewhat similar rule. In the latter case, it is difficult to say whether the sale was by sample or by description. The syllabus calls it "a sale with samples," etc. At all events, the sale note with which probably the samples corresponded ran: "Bou't of Samuel Bispham, 50 hhds. superior sweet-scented Kent'y leaf tobacco." On delivery, the tobacco turned out to be Kentucky leaf, inferior to the samples, of an exceedingly bad quality, mostly heated, low, faded, rotten; not superior sweet-scented, and unfit for consumption where it was consigned. The court refused to admit the offers of plaintiff to prove this, and it was held no action lay for breach of warranty, and plaintiff was nonsuited. On appeal, this was confirmed; Coulter, J., saying: "The cause seems to be conclusively governed by the case of Borrekins *v.* Bevan, *supra*, . . . in which . . . the rule was established that, in all sales of goods by bills of parcels, samples, etc.,

[1] 2 Watts (Pa)., 367. [2] 10 Pa. St., 320.

there is an implied warranty that the article delivered shall correspond in *specie* with the commodity sold, unless there are facts and circumstances to show that the purchaser took upon himself the risk of the *kind*, as well as the *quality* of the commodity purchased. If that case means anything, it means this, that when the thing is sold by sample, and without express warranty, the purchaser takes it at his own risk, unless it should prove to be an article different in kind; all gradations in quality are at the hazard of the buyer. But if an article was sold as a diamond, and turned out to be glass, or when the thing was sold as tea, and was, in fact, chaff, the vendor would be responsible, thus rendering the seller liable for a difference in kind, but not for a difference in quality. . . . The gist of the whole case, on the part of the plaintiffs is, that the tobacco was not of a quality equal to the sample, but of inferior flavor, taste, and quality."

§ 123. In Dailey *v.* Green,[1] a rule more in accordance with that of the other States was asserted by Judge Bell, who delivered the opinion of the court, though the case went off on another point. He said: "By his agreement to deliver in accordance with the order, the plaintiff in effect warranted the timber delivered should *be accordant with that described in the order; for in a sale of goods by*

[1] 15 Pa. St., 118.

*sample, or upon a written contract of articles of a particular description, which the purchaser had no opportunity of inspecting, the law implies a warranty that the article shall answer the description in the written contract.*" Fraley *v.* Bispham was not cited. But in the two following cases, the rulings of Fraley *v.* Bispham and Kirk *v.* Nice were reasserted.

§ 124. In Carson *et al. v.* Baillie,[1] the plaintiffs, lard oil manufacturers, called at the defendant's place of business, asked for "lard grease," and were shown 5 or 6 barrels out of two lots of 46 barrels which they inspected, and were asked to inspect the rest, which they, however, declined to do; but took the whole, and the bill of sale described the sale as of "lard grease." Subsequently plaintiff sent back the barrels they had received, alleging they were not according to sample. Defendants declined to receive them, and plaintiffs afterwards sent for the remainder of the lot. The article delivered consisted of two lots, different in appearance, and the inferior portion was not "lard grease" at all, but a compound having alkali or resin in it. There was no proof of fraud or of an express warranty. One count alleged defendants had falsely warranted by sample the article

[1] 19 Pa. St., 375.

to be "lard grease" of a quality suitable for No. 1 lard oil; and another count set up a breach of the warranty of identity, alleging that defendants had sold 46 barrels of "lard grease," but had delivered some other article. The court charged the jury, *inter alia:* "The proper inquiry for the jury is, 1st. Was the article sold 'lard grease?' if not, it does not correspond in specie with the article described in the bill of sale; 2d. If the article delivered was not 'lard grease,' what damages have been sustained by plaintiff?" Held, to be error, Lowrie, J., saying: "There was evidence that the buyer examined the article called 'lard grease' before he bought it; that an inspection of the whole lot was offered to him, and that after examining four or five barrels in the usual way, he declared himself satisfied and received a bill of sale, in which the article was called 'lard grease.' . . . There was evidence that a large part of the article delivered was of a very inferior quality; *some of it not being lard grease, but a mixture of grease and potash.* . . . In this case there was no pretence of a sale by sample. . . . *We do not see how it was possible for the plaintiff to recover on the ground that he did not get the very article that he bought*, for there was no evidence to sustain such a position." Lord *v.* Grow[1] was a sale of "good spring

[1] 39 Pa. St., 88.

wheat," which turned out to be "winter wheat," so that none of it came to maturity when sown, and the crop was lost. The wheat was examined, but it was impossible to detect the difference between the two on simple inspection. Both kinds of wheat were in the mill where the wheat was shown to the plaintiff by the miller. Held, no action lay, Strong, J., remarking: "The tendency of the modern cases has been also to the doctrine that in sales of articles in regard to which the seller is presumed to have superior knowledge, there is a warranty that the thing sold shall be in kind what it is represented to be. The case before us is not one of this character. . . . True, the difference between spring wheat and other wheat is not ascertainable by inspection, and it may be assumed that *they are not the same in species*, still, the case is one of a purchase on inspection of an article, of which the vendor's means of knowledge were no greater than those of the vendee."

§ 125. The principle of these two cases is not easy to understand. In Carson *v.* Baillie, the sale was considered by the court to be by inspection, and it is not stated whether the difference between the article sold and that delivered was discoverable on an ordinary inspection, though, according to the principles of Lord *v.* Grow, this would seemingly have made no difference. But the evidence

in the case, the language of the court, as well as the invoice, all indicate the sale to have been of a commodity known as "*lard grease*," and this was not delivered. The buyer, it is true, had inspected part, and could have inspected all; and admitting that the difference between *lard grease*, and the *compound of alkali or resin*, delivered, was discoverable on mere inspection, and that the seller was only bound to deliver the *compound of resin, etc.*, or the *lard grease*, inspected, however unmerchantable; still, with respect to the uninspected portion, it would seem that at least the seller was bound to deliver *lard grease*, however worthless; for it can hardly be seriously contended that the buyer was bound to receive the remainder of the lot of a different species, from the portion he had inspected and had intended to buy. If the difference between lard grease and the compound of alkali delivered was discernible by an ordinary examination, the case of Lord *v.* Grow carried the principle of *caveat emptor* further than this case; though, if the difference between them was not so ascertainable, the rules of the two cases are substantially alike; for in Lord *v.* Grow the two commodities were apparently similar, and the difference could not be detected on an ordinary inspection. But, as has been stated, these cases are of doubtful authority. The true principle applicable to them is

very clearly put by Bell, J., in Cornelius *v.* Molloy.[1] "It will matter nothing that the article has been inspected and received by the buyer, if its *true character be not easily ascertainable by such means, short of an analytical experiment*, as only indolence or folly would omit. This doctrine is asserted in Osgood *v.* Lewis.[2] . . . Borrekins *v.* Bevan,[3] afterwards recognized in Jennings *v.* Gratz,[4] as settling the rule in Pennsylvania, that a seller is answerable where *the article inspected and received by the buyer fails to correspond in specie with the thing, as which it was sold.* To the same effect is Shepherd *v.* Kain.[5] . . . Most of these, it is true, *were actions ex contractu arising from a breach of warranty, express or implied.* But the principle they announce is *à fortiori* applicable in case, as for a deceit, etc."[6]

§ 126. These were followed by Wetherill *v.* Neilson[7] and Whitaker *v.* Eastwick.[8] Wetherill *v.* Neilson was an action on a note for the price of goods sold, and the bill of sale ran: "Bought

[1] 7 Pa. St., 297.

[2] 2 H. & G. (Md.), 495.

[3] 3 Rawle (Pa.), 23.

[4] 3 Rawle (Pa.), 168.

[5] 5 B. & Ald., 240.

[6] See, also, Josling *v.* Kingsford, 13 C. B. N. S. 447; Henshaw *v.* Robins, 9 Met. (Mass.) 87; Wolcott *v.* Mount, 7 Vr. (N. J.) 262; S. C., 9 ib., 496.

[7] 20 Pa. St., 448.

[8] 75 Pa. St., 229.

of Thomas Neilson 35 casks of soda ash 48 per cent., weighing as follows: 304 to 338 (inclusive), each cask having its weight set down, etc." On the trial it was proved that Neilson's broker got a specification from him of the 53 *casks of soda ash, afloat, of* 48 *degrees strength, English test;* that the sale was made by the broker on the distinct understanding that the soda was 48 *degrees English test;* that he was authorized to represent the soda as of that test. The defendants offered then to prove that the soda ash delivered was below the 48 *per cent.* agreed upon in the contract, and was *unmerchantable, not being what it was sold for.* This was rejected by the court. They further offered to show that it was so far below the English test, *as to be useless for what it is usually sold,* and that there was a custom of the trade at the place of contract, to the effect that soda ash is sold upon the representation of the seller as to the percentage of alkali contained in it, without sample or warranty, and that the soda in question was sold on such representation. All this the court rejected, and on appeal was affirmed. In Whitaker *v.* Eastwick,[1] plaintiffs purchased a cargo of coal, without seeing it, *on the representation of the defendant that it was "good coal, well adapted for generating*

[1] 75 Pa. St., 229.

*steam.*" On a suit to recover back the price, the plaintiff offered to show that there was at least twenty per cent. of slate and dirt in it, and that it was *unmerchantable*, which offer was admitted by the court. On appeal the action of the lower court was reversed, Mercur, J., saying: "It is well settled as a general rule that the purchaser takes the risk of the quality of an article purchased, unless there be fraud or warranty. In this case no fraud is alleged, and there was no express warranty. The action is *assumpsit* on an implied warranty. There is an implied warranty of title, and *generally of species* in a sale, but not of quality. . . . They got substantially the kind of coal for which they bargained. . . . The fact that it was represented as being well adapted for generating steam, and that by reason of its impure quality a larger quantity is required to generate a given amount of steam, are all insufficient to raise an implied *assumpsit.*"

§ 127. The decisions in the two foregoing cases are likewise difficult to account for, and are certainly not in harmony with Borrekins *v.* Bevan or Jennings *v.* Gratz, for here, again, the article delivered was unmerchantable, under the terms of the description in each case, and in the second case, was also unfit for the special use intended for it

by the vendee, and for which it had been represented as fit by the vendor.

§ 128. In marked contrast with these last few cases, stands the vigorous charge to the jury of Sharswood, J., upon this point, in Edwards *v.* Hathaway,[1] in the District Court of Pennsylvania. After stating the facts, that learned judge said: "The general rule of law is, that upon the sale of any article of merchandise, the seller does not become responsible for the quality of the article sold, unless he either expressly warranted the quality, or made a false and fraudulent representation in regard to it. This rule, however, is subject to some reasonable exceptions. It does not apply where the purchaser has no opportunity of inspecting the article. Thus, if a man orders goods of a manufacturer, it is an implied term of the contract that they shall be of merchantable character, if ordered to be made for sale, or fit for the purposes intended whatever they may be. I take it the same modification of the general rule applies when a coal dealer gives an order to the agent of a mine for coal to be sent to him from the mine, it is an implied term of the contract that the coal shall be of a merchantable character. It would not be allowed in such a case, that the seller should, in

[1] 1 Phila., 547 [1854].

compliance with such an order, send an article which, though it might pass muster, by the name of coal, was composed of one-half slate or stone. It would be different, if a man went into the coal yard and purchased a quantity of coal there lying. His eyes, in such a case, are his market, and if he distrust his own judgment, he should take the opinion of those who are acquainted with the article, or require the seller to warrant. But a man's eyes are of no use to him, when he is buying something in the bowels of the earth, or a hundred miles distant."

§ 129. In Warren *v.* Philadelphia Coal Co.,[1] the seller, who had previously sold coal to the buyer, offered him a lot at a certain price, accompanying the offer, with the statement, that it was of the same quality as that previously furnished, and the buyer agreed to take it, if this was so, but said he would not take it if it were not good coal. Held, evidence was admissible to show that the article delivered under the contract was not as good as that previously supplied. As it appears, this was regarded by the court as an express warranty of quality, though perhaps it might be more correctly termed a sale by description.

[1] 3 W. N. C. (Phila.), 525.

§ 130. In Havemeyer *v.* Wright[1] [1882], not reported, in the Circuit Court of the United States for the Eastern District of Pennsylvania, plaintiffs had contracted to deliver a lot of "old T rails," and, in fulfilment of their contract, offered a quantity of "T rails," not new, but unused, which proving, however, brittle, of a bad quality, worthless, and, as contended, not the same commodity, defendants declined to receive them. In an action for the price, plaintiffs insisted that "old T rails" were substantially any "T rails" which had become old whether used or not, and consequently that the "T rails" delivered being old, though not used, were included under the denomination of "old T rails." It appeared, however, that "old T rails" had a special signification in the trade, and were principally of value, because, having been used, their quality had been tested; in short, that "old T rails" were a peculiar commodity, not merely old rails, but old rails that had been subjected to use, and different from unused "old rails." McKennan, Cir. J., charged the jury, substantially, that it had been abundantly shown that "old T rails" were of special value, from the fact of having been subject to use for railroad purposes; and, consequently,

[1] See also Scheppers *v.* Stewart, 11 W. N. C. (Phila.) 106; Driesbach *v.* Lewisburg Bridge Co., 32 Sm. (Pa.) 177.

there were two questions for the jury to consider: the first was, whether assuming this fact; the term "old T rails," in a commercial sense, included old, but not used "T rails," and whether the two were substantially the same commodity; and, secondly, even if the two articles were the same commodity, were the unused "old T rails" delivered, merchantable, or were they worthless, as "old T rails." Verdict and judgment for the defendants. Butler, D. J., concurred.

*This case was put on the ground of condition precedent, the true principle.*

### II. *Sale of Choses in Action.*

§ 131. With respect to the sale of bills, notes, securities, etc., there is no implied warranty of *value* on the part of the seller. But he is bound, as on a condition precedent, to deliver what the contract calls for, and in the case of bills, notes, etc., the seller is liable, if the indorsements or signatures are not genuine.

§ 132. As in Merriam *v.* Wolcott,[1] where the plaintiff had purchased of the defendant two promissory notes, for a sum less than their face value, both of which, without the knowledge of the parties, had forged indorsements. It was held that

[1] 3 Allen (Mass.), 258.

an action would lie to recover back the money. So, in Lobdell *v.* Baker,[1] the note was indorsed by a minor, and it was held that upon the sale there was an implied warranty that the indorsement was by one capable of binding himself by a valid contract. And in Terry *v.* Bissell,[2] where the defendants had sold the plaintiffs a note not then due purporting to be signed by A., and indorsed by G. and S.; the signature of A. was genuine, but those of G. and S. forged; both parties were ignorant of the forgery; on the discovery of the forgery, plaintiffs offered to return the note, which defendants declined to receive; the court held an action lay for money had and received. Ellsworth, J., said, *inter alia:* "The signatures of Mr. Gorton and Mr. Smith, which alone gave value and credit to the note, not being legally attached to the note, it is not the thing which was negotiated for between the parties, any more than the dead horse can be said to be the horse sold, because the lifeless body remains, and the hide and shoes are of some little value. The names of Mr. Gorton and Mr. Smith are no more on the note than if nothing was written on it at all, and without these names the thing is substantially worthless. . . . We think the purchaser was entitled to have a

[1] 1 Metc. (Mass.), 193. [2] 26 Conn., 23.

thing of the kind and description which the thing sold and purported and was understood to be."[1]

§ 133. In the case of a sale of scrip, stock, debentures, bonds, etc., the seller will be also compelled to deliver an article salable under the description or denomination employed in the contract, for the purchaser has a right to get what he bargains for, whether the same be of value or worthless.

And here it may be well to notice a distinction between forged certificates of stock, debentures, etc., and those illegally issued, but sold on the market. For example, if scrip or stock of a particular kind be dealt with on the market, which turns out thereafter not to have been properly or legally issued by the corporation issuing it, the seller will not be liable to the buyer, even though the thing delivered prove worthless. Where, however, the seller delivers, ignorantly, forged certificates, etc., the buyer can recover from him the value of genuine certificates, etc., of the same kind. Cases may, of course, be imagined where the two classes thus indicated run into each other, as where an officer of a company issues a security without authority, which is afterwards repudiated; but in these cases the question is simply one of fact:

[1] See, also, Ross *v.* Terry, 63 N. Y. 613; Faulks *v.* Kamp, 3 Fed. Rep. 898; Ellis *v.* Grooms, 1 Stew. (Ala.) 47.

"Was the intention of the parties, as interpreted by their contract, to purchase the thing or security, or not?" and this is, of course, a question for the jury.

§ 134. This is illustrated by Lambert *v.* Heath,[1] where the plaintiff bought, through a stock broker, "Kentish Coast Railway Scrip," signed by the secretary of the railway company. This turned out to have been a fraudulent issue, the secretary signing without authority, and was repudiated. In an action to recover from the defendant the price paid for the scrip and his commission, the court held it to be a question for the jury to say whether the plaintiff had intended to buy this particular scrip. Alderson, B., said: "The question is simply this: Was what the parties bought in the market 'Kentish Coast Railway scrip'? It appears that it was signed by the secretary of the company; and if this was the only Kentish 'Coast Railway Scrip' in the market, as appears to have been the case, and one person chooses to sell and the other to buy, that then the latter had got all that he contracted for. That was the question for the jury."

§ 135. Where, however, there are found to be spurious and genuine shares, etc., on the market the buyer will be presumed to have contracted for

[1] 15 M. & W., 486.

the genuine, and a delivery of the spurious shares will not be valid.[1]

§ 136. It is hardly necessary to add that, in the United States the condition of genuineness is usually termed an implied warranty of genuineness; in analogy to the general rule laid down, as above, with respect to the implied warranty in the sales of chattels.[2]

### III. *Sale of Patents.*

§ 137. The implied stipulation of validity in the sale of patents might be discussed here, but falls more appropriately under the head of "Title," and will be there considered.

## Section III. Implied Condition of Manufacture.

§ 138. It has been asserted, in a sale of an article by a manufacturer or maker, not otherwise a

[1] See Biddle on Stock Brokers, pages 262–266; Young *v.* Cole, 3 Bing. N. C. 724; Westropp *v.* Solomon, 8 C. B. 345; Gompertz *v.* Bartlett, 2 E. & B. 849; Gurney *v.* Womersley, 4 E. & B. 133; Mitchell *v.* Newhall, 15 M. & W. 308; Edwards *v.* Marcy, 2 Allen (Mass.), 486; Porter *v.* Bright, 82 Pa. St. 441; Kennedy *v.* Panama, etc., Co., L. R. 2 Q. B. 580.

[2] See Bank *v.* Morton, 4 Gray (Mass.), 156; Swanzey *v.* Parker, 50 Pa. St. 441; Wood *v.* Sheldon, 42 N. J. L. R. 421; Bank *v.* Kurtz, 11 W. N. C. (Phila.) 225; Littauer *v.* Goldman, 72 N. Y. 507.

dealer in articles of the same kind, that there is an implied condition that the article sold shall be of the manufacturer's or maker's own make. There are, so far as I know, but three cases upon the point; and the decisions are not harmonious.

§ 139. The decision in West Stockton Iron Co. *v.* Nielson & Maxwell[1] [1850] turned upon this point. There the pursuers, manufacturers of iron ship-plates, had contracted to supply to the defenders a lot of "iron ship-plates," and in implement of their contract, offered to deliver, *inter alia*, a number of plates of another manufacture, admittedly "being *equally good* and of *equal marketable value* with pursuers' iron." Defenders refused to accept any plates but those of the pursuers' manufacture, and pursuers sued for breach of contract. There was no satisfactory evidence of any custom or usage of trade affecting the question. Held, that the mere fact of another's manufacture was not a good ground for refusal to receive the goods tendered, they being of equally good and merchantable value; and there being no especial reason shown why the goods tendered were not just as *valuable*, as any of the same kind, for any purpose, as those manufactured by the pursuer. Lord Young dissented. Lord Gifford said: "The question is a narrow one, but I am of opinion that it is

[1] 17 Scotch Law Rep., 719.

really rather a question of fact than a question of law. I think here, as in all such cases, that the question of fact is, Was it part of the contract? That is, was it an inherent condition of the contract that the ship-plates should be exclusively the manufacture of the pursuers themselves? I am not prepared to lay it down as an absolute rule that when goods are ordered from a manufacturer, even in cases where the manufacturer is not also a merchant or dealer, it is to be held universally that the contract can only be fulfilled by the delivery of goods made by the seller himself. On the contrary, I think that in each case this must be determined by the terms of the contract and by the surrounding circumstances. Where such a condition is intended, it can easily be expressed in one or two words: Thus . . . 'of your brand,' or 'of your manufacture,' or 'from your works,' this would be enough, and the seller would not be allowed to substitute goods of the same kind from other sources. In other cases such a condition may be very easily inferred, as when the thing sold is a specialty which the seller alone produces, or produces under a special name which is separately known in the market, or where there is a *delectus personæ*, in order to secure the personal skill of a particular manufacturer. Thus, in orders given to an artist for works of art, and in all similar cases, there

would arise a presumption that the artist himself was to devote his skill in the production, or at least in the superintendence and finishing of the articles ordered. But in almost all cases which do not infer the work or skill of a special person, I think it is a question of circumstances and of evidence whether or not it is *pars contractûs* that the goods shall be manufactured in any special factory. When the goods ordered are not prepared by any special process, but are produced by ordinary and common machinery universally employed for the purpose, there will, I think, be no necessary implication that the machinery belonging to the seller shall alone be employed in their production. For example, if planks or sawn wood be ordered from a proprietor of saw-mills, the wood being specified as of a particular kind, size, and thickness, it would be difficult to say that it was a condition of the contract that it should be sawn by the seller's machinery and not otherwise." Lord Young, dissenting, said: "Now I venture to think it is a generally, if not universally, true proposition that such a contract made with a manufacturer of the article to be made or supplied under it, implies that the article shall be of his manufacture. That the parties meant otherwise may be expressed or even collected from the whole term of the contract, but the *prima facies*, the meaning of the contract

in my opinion, is as I have stated. A contract for a commodity of common use entered into with a man who is a dealer, as well as a maker, is quite different. He must supply the goods of the quality bargained for, no matter where he gets them. But if he is only a manufacturer of the goods contracted for, the implication, without the necessity of express words, is that he shall supply goods of his own manufacture. Nor is it material, in my opinion, . . . that his goods are really no better than those of many other manufactured goods." From a review of this case, it certainly appears that the point is not altogether free from doubt; but it seems to me the result reached by Lord Young is the more natural and reasonable rule; and when we consider that Lord Gifford thought it pertinent to note that the choice of the pursuer's works was accidental, a suggestion of a third party; that one of the defenders stated the plates were purchased for ordinary speculation; that the defender's customers, who were in the habit of taking the plates, never asked about the makers; that no distinction was made between the different plates in the market; and that one maker often supplied plates procured from other makers, we are led to conclude that his decision is really logically founded on the peculiar facts of the case at issue, and not on the broad proposition of law

asserted by him in this case. In fact, perhaps, it would not be too much to say, that many of his remarks, in respect to the proposition of law under discussion, are scarcely more than dicta, as his opinion shows clearly that the decision was based upon the attendant circumstances of the case, and in the absence of these, the judgment of the court should logically have been the other way; and, in reality, that his reasoning militates against the proposition which he asserts. In Johnson *et al. v.* Nicoll[1] [1881] *et al.*, the principles laid down in the preceding case were adopted and followed.

§ 140. In Johnson *et al. v.* Raylton[2] *et al.*, in the Court of Appeals, in England, the view of Lord Young was approved, and it was held, *inter alia*, by Brett[3] and Cotton, L. JJ., and overruling Manisty, J., that "where goods are purchased of a manufacturer, not otherwise a dealer in them, in the absence of any custom or usage to the contrary, there is an implied condition that the goods are of the seller's own make, and that it is immaterial whether the goods proposed for delivery are as good, or even better, than similar goods of the seller's own make. Bramwell,[4] L. J., dissented. Brett, L. J., delivered a very able and

[1] 18 Scotch Law Rep., 268. [2] L. R. 7 Q. B. D., 439, C. A.

[3] The present Master of the Rolls.

[4] At present, Lord Bramwell.

lucid opinion on the point, and I shall give extracts from it at some length. He said: "It seems to me that it cannot make any difference whether the goods happen to be in existence or in stock, or whether they have still to be made when the contract is entered into. The terms of the question embrace equally both positions. . . . It seems to me useful, in order to present the question clearly to one's mind, to consider what is the alternative, if there be no implication, as suggested. If there be not, what are the contracts imposed upon the manufacturer, under the given circumstances, with regard to the nature or quality or making of the goods? One is, that the goods shall be merchantable; another is, that they shall be reasonably fit for the purpose for which they are ordered. I know of no other implied contract as to the nature or make of the goods. There is no contract that they shall be equal to the ordinary make of the manufacturer himself, or to the ordinary make of all manufacturers of similar goods. It has been suggested, that if the manufacturer have a mark or brand of his own known in the market, or if his goods have a known character in the market, that then the suggested contract may be implied. But if the manufacturer does not propose prices for goods manufactured by himself, as distinguished from goods not so manufactured, I can see

no reason why, unless the implication is to be made in all cases, it is to be made in the given cases. . . . . If, then, there is no other contract binding on the manufacturer, in the absence of the suggested one, but the two I have above mentioned, it is immaterial to inquire whether the goods, the subject-matter of the contract, are such, as in ordinary circumstances one manufacturer makes substantially as well as another. It was immaterial to consider in this case . . . whether the goods, which the plaintiffs were ready to deliver, were as good as if manufactured by the plaintiffs themselves. . . . If, then, there be no such contract as is suggested, a manufacturer, under the stated circumstances, may supply goods not manufactured by himself, inferior to his own usual manufacture, inferior to the usual manufacture of the person from whom he has purchased, inferior to the usual standard of manufacture by other manufacturers of similar goods, the goods of a manufacturer to whose manufacture the purchaser, whether with good reason or from fancy, has objected, and with whom, on account of such objections, the purchaser has ceased to deal, and to whom, on account of such objections, he has preferred the manufacturer with whom he is now dealing. If only the goods supplied be merchantable, and reasonably fit for the purpose for which

they are ordered, the purchaser must accept them, notwithstanding any of these objections he may feel. . . . It seems to me, after long consideration, to be more consonant with the ordinary simplicity of fair mercantile business, and more in accordance with legal principles, to say that he who holds himself out to be a selling manufacturer of goods, and does not hold himself out as being otherwise a dealer in such goods, does hold out to a proposing purchaser that what he (the manufacturer) offers to do, on an order given to, or contract otherwise made with him, for the supply of goods, such as he professes to deal in, is that he will supply goods manufactured by himself. . . . Several objections were made to this view: as that, in certain trades it is known that a manufacturer, to whom an order is given, fulfils it by delivering goods manufactured by other makers. If such a mode of fulfilling such a contract is generally known to both buyers and sellers in a particular manufacture, such an usage would negative the suggested proposition. . . . It was suggested that if the implication exists, the absence or death of a partner in the manufacturing firm would render the contract impossible of performance by the manufacturing firm. But the implied contract seems to me in reason to be, not that the goods shall be manufactured under any particular per-

sonal superintendence, . . . but that the only binding stipulation is that the goods shall be of the manufacture of the manufacturer, understood in the ordinary business sense of that phrase, *i. e.*, made by the ordinary appliances of the manufacturer's works. It was suggested that the implication would require every part of the manufactured article to be made in the factory of the manufacturer, as every wheel of a watch to be made by the watch-maker, or every part of a carriage by the coach-maker; but in such cases, the article, which is the subject-matter of the contract, is the article made up of different parts; and the parts, before they are put into that article, so as to form it, are not the subject-matter of the contract. It was suggested that a great manufacturer would not, without the power of employing others, be able to fulfil his contract; but if it be held that the implied contract does arise, where a manufacturer has a known good brand, or a known good work, then it it is precisely the greatest manufacturer who will be deprived of the suggested necessary power. . . . As to authority, there are only the Scotch cases, which are to be treated with every respect. I notice, however, that the Lord Ordinary and Lord Young agree with the view which I, in the end, think right; and that Lord Gifford founds his judgment on a view of the particular evidence in the case before him, and does not deal with the general proposi-

tion at all. . . . Let me say that I have arrived at this conclusion, after many doubts and with much hesitation, the greatest cause of doubt being the opinion of Bramwell, L. J."

Probably the conclusions of the court in this case would be sustained elsewhere.

§ 141. The following conclusions may be stated as the result of the foregoing cases in Chapter III., viz:—

1. That, in a contract of sale, the subject-matter of the sale must be in existence at the time stipulated for the performance of the contract, for if the subject-matter of the sale has never existed or has ceased to exist at that time, there can be no performance of the contract, and consequently no sale; and this is a condition and not a warranty.[1]

2. That, in the sale of an ascertained specific article, where the title passes by the sale, there is no implied warranty of quality or condition, but the buyer purchases on his own judgment, and the rule is *caveat emptor*.[2]

3. But in a sale by description, there is an implied stipulation that the article delivered shall correspond strictly with the description.[3]

4. That, in England, this stipulation is considered as a condition precedent;[4] but in the United

[1] §§ 85–88. [2] § 101. [3] §§ 89–130. [4] §§ 89–102.

States, generally, it is looked upon as an implied warranty.[1]

5. That this implied stipulation exists in a sale of goods to order;[2] and in the sale of a specific article, inspected by the buyer, provided the true character of the article described cannot be detected on an ordinary inspection.[3]

6. That a sale by sample may for certain purposes be considered as a sale by description, and the vendee may reject the bulk of the article delivered, if not correspondent with the sample.[4]

7. That there is an implied stipulation of identity or genuineness, in the sale of choses in action, in analogy to the sale of goods.[5]

8. That, in Pennsylvania, there is asserted to be an implied stipulation of identity or genuineness, but the cases conflict, and the principles of the rule in that State are not easily understood.[6]

9. That, in a sale of an article by a manufacturer, not otherwise a dealer in other articles of the same kind, there is probably implied a condition that the article sold is of his own manufacture.[7]

[1] §§ 103–130. [2] §§ 89–130. [3] §§ 101, 102, 111, 125.
[4] §§ 99–100. [5] §§ 131–136. [6] §§ 117–130.
[7] §§ 137–140.

# CHAPTER IV.

## IMPLIED WARRANTIES.

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§ 142. It appears from the review of the preceding cases that, in the ordinary sale of a specific existing chattel, which has been, or may be, inspected by the buyer at the sale, there is no implied warranty as to the quality or condition of the thing sold; but all risks as to them fall upon the buyer; the maxim of the common law upon the point being *caveat emptor;* and this maxim applies even though the defects which exist in them are latent, and not discoverable on examination—at least where the seller is neither the grower, the producer, nor the manufacturer, and no fraud is shown. The buyer in such a case has the opportunity of examining the goods and exercising his judgment upon the matter, and if his judgment is doubted by him, he may insist upon a warranty.[1]

§ 143. The principle of the rule of *caveat emptor* is well illustrated by the case of Burnby *v.* Bollett.[2] The defendant, being a farmer, purchased a pig, exposed for sale, of a butcher, and resold the

[1] See remarks of Mellor, J., in Jones *v.* Just, L. R. 3 Q. B. 197. See, also, Emmerton *v.* Mathews, 7 H. & N. 586; Parkinson *v.* Lee, 2 East, 214. See *supra*, § 5.

[2] 16 M. & W., 644. See Eagan *v.* Call, 34 Pa. St. 238.

same to the plaintiff, another farmer. The meat turned out to be diseased, and the court decided that there was no warranty implied that the animal was fit for food, although the seller must have known that the pig was intended for that purpose, as the seller was not a dealer. There was no fraud, the purchaser buying on his own judgment. So in Bluett *v.* Osborne,[1] which was the sale of a bowsprit, which the buyer might have inspected, and which was apparently good, but after a voyage turned out to be rotten, and there was no fraud; Lord Ellenborough held the seller was not liable for the subsequent failure, but the buyer was liable for the price.[2]

§ 144. But this rule, as to implied warranty, must not be confused with the implied stipulation of identity in a sale by description, where the rule, as we have seen, is, that in a sale of an existing chattel, though inspected by the buyer, there is a condition that it shall answer the description, and a warranty that it shall be of a merchantable quality, provided its condition or character cannot be ascertained on an ordinary inspection.

§ 145. This distinction is very clearly pointed

[1] 1 Stark, N. P. C., 308.

[2] See, also, Bartlett *v.* Hoppick, 34 N. Y. 118; Deming *v.* Foster, 42 N. H. 165; Hadley *v.* Clinton, 13 Ohio St. 502; Maynard *v.* Id., 49 Vt. 297; Moses *v.* Mead, 1 Denio (N. Y.), 378; 5 Ib. 617; Bragg *v.* Morrill, 49 W. 45; Cogel *v.* Kniseley, 89 Ill. 598.

out by the arguments of counsel, and the remarks of the justices in Josling *v.* Kingsford,[1] where it was held, in a sale of "oxalic acid," that the vendor could not enforce the sale, though he had declined to warrant, and had invited inspection; the jury finding the sale to be by description, and that the article, whose nature was not discernible, on a mere inspection was not of a sufficiently high test to be salable as "oxalic acid."[2]

§ 146. The buyer, however, in all cases, has a right to inspect the goods, and where he is, through the seller's fault, prevented from making an examination, or where there is no opportunity to inspect, the rule of *caveat emptor* does not apply. This happens, usually, in a sale of goods to order, and the principle will be exemplified by the cases about to be reviewed, as well as by the remarks of Brett, J., in Heillbut *v.* Hickson.[3] There the plaintiffs, merchants of London, contracted, on behalf of their correspondents at Lille, France, with the defendants, manufacturers of shoes, for the purchase of 30,000 pairs of army shoes, *as* per *sample;* to be inspected, and quality approved before shipment. A sample shoe was deposited, and both parties knew the object for which the shoes were

[1] 13 C. B. N. S., 447.

[2] See, also, Henshaw *v.* Robins, 9 Metc. (Mass.) 83; Cornelius *v.* Melloy, 7 Pa. St. 297.

[3] L. R. 7 C. P., 438.

wanted. A qualified person was appointed to inspect the shoes on plaintiff's behalf, at London, and a large number were approved and delivered. The soles were not opened on the inspection, as that is not usual, and without it, it could not be known of what material the fillings of the soles had been made. Subsequently the shoes were cut open and examined at Lille, owing to certain circumstances that had occurred, and large numbers of the shoes were found to contain paper fillings; and the jury found that the shoes delivered, and those ready for delivery, were not equal to sample, and that the defects could not have been discovered by any inspection which ought, reasonably, to have been made. Brett, J., remarked: "The defect in the shoes was the consequence of acts of the defendants' servants, the defendants being the manufacturers of the goods, and the defect, though known to the defendants' servants, was a secret defect not discoverable by any reasonable exertion of care or skill on an inspection in London. By the necessary inefficacy of the inspection in London, an inefficacy caused by this kind of fault, viz., a secret defect of manufacture which the defendants' servants committed, the apparent inspection in London could be of no more practical effect than no inspection at all. If it could be of no practical effect, there could not be any effective, and therefore any practical inspec-

tion until an inspection at Lille. . . . The apparent inspection in London being then, by the act of the defendants' servants, no inspection at all, and, consequently, a real inspection at Lille being, by the act of the defendants' servants, the first possibly effective inspection, it seems to me that such inspection was by the acts of persons, for whose acts the defendants are responsible, substituted for the first inspection stipulated by the contract, and that the rights of the plaintiffs accrued upon the inspection, as if it were the first, and therefore they were entitled to throw the shoes upon the hands of the defendants at Lille."[1]

§ 147. But if the buyer neglects to make any inspection, where the opportunity is afforded, though it be inconvenient, or makes a careless inspection, he will be considered to have waived his right to inspect, and the rule of *caveat emptor* applies.[2]

§ 148. Thus, for example, in Byrne *v.* Jansen,[3] plaintiff bought a lot of wool, and was informed by defendant that the wool would be short, that

[1] On this point see Hoe *v.* Sanborn, 21 N. Y. 552; Rodgers *v.* Niles, 11 Ohio St. 48; Osgood *v.* Lewis, 2 H. & G. (Md.) 524; Hyatt *v.* Boyle, 5 G. & J. (Md.) 118, and preceding cases in Chapter II.

[2] See Hyatt *v.* Boyle, 5 G. & J. (Md.) 120; Humphreys *v.* Comline, 8 Blackf. (Ind.) 516; Hargous *v.* Stone, 5 N. Y. 84.

[3] 50 Cal., 624.

the sheep were "poor and burry," though the burrs fell off in the spring, and was requested to examine the sheep. Plaintiff declined this, and the wool was sent to plaintiff in April, 1872, who shipped it to San Francisco for sale. In February, 1873, the wool was found to be in a bad condition, and sold for much less than it would have sold for, if of good quality. Held, plaintiff could not recover. The court said: "The defendant, when the contract of sale was in progress, invited C'Connell (plaintiff) to go and inspect the sheep; he declined; said he knew something of them; said he would make the bargain any how, without seeing them. Again, when the wool was subsequently delivered, the plaintiff had an opportunity to inspect it, but did not avail himself of it. . . . Under such circumstances, no artifice having been resorted to by the defendant to prevent the examination, the maxim *caveat emptor* applies."[1]

§ 149. Where, however, the purchaser does not buy on his own judgment, from an inspection of the goods, but the sale is of goods to be made or supplied to order, the rule of *caveat emptor* does not apply, but, on the contrary, the common law implies several stipulations, on the part of the seller, which may conveniently be considered, as follows:

[1] See, also, Barnard *v.* Kellogg, 10 Wall. U. S. 383; Eagan *v.* Call. 34 Pa. St. 236.

SECT. I. The implied condition, or as it is sometimes termed, the implied warranty of identity or genuineness.

SECT. II. The implied warranty, in a sale of goods by description, that the article sold shall be of a reasonably merchantable quality.

SECT. III. The implied warranty, where the seller's skill is specially relied upon in the purchase, that the goods shall be suitable for the special purpose for which they are intended by the buyer, provided the seller be informed of it at the time the order is given.

SECT. IV. The implied warranty in a sale by sample, that the goods sold shall correspond in bulk with the sample exhibited.

SECT. V. The warranty implied from a usage or custom.

SECT. VI. The implied warranty of title.

## SECT. I. THE IMPLIED CONDITION PRECEDENT, OR AS IT IS SOMETIMES TERMED, THE IMPLIED WARRANTY OF IDENTITY OR GENUINENESS, IN A SALE BY DESCRIPTION.

§ 150. The implied condition, or as it is sometimes termed, warranty, of identity or genuineness, falls more appropriately under the title of implied conditions, and is there considered.[1]

[1] See *supra*, Chap. III., §§ 89–137.

## SECT. II. THE IMPLIED WARRANTY, IN A SALE OF GOODS BY DESCRIPTION, THAT THE ARTICLE SHALL BE OF A REASONABLY MERCHANTABLE QUALITY.

### I. *Sale of Chattels Generally.*

§ 151. Where an article is sold by description, there is, besides the condition, or warranty as it is sometimes termed, above adverted to,[1] an implied warranty that the article sold shall be reasonably merchantable, under the terms of the description; that is, reasonably fit for such purposes as such kinds of goods are usually put to.

§ 152. Thus in Jones *v.* Bright,[2] Best, C. J., observed: "If a man sells an article, he thereby warrants that it is merchantable; that is, that it is fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose, and no case has been decided otherwise, although there are doubtless some *dicta* to the contrary."

§ 153. A good illustration is had in Gardiner *v.* Gray;[3] the sale was of "waste silk," not by sample, though a sample was exhibited to determine the character of the goods; and there were, *inter alia*, counts charging the promise that the silk should be of a merchantable quality; but Lord

[1] See § 150. [2] 5 Bing. R., 544. [3] 4 Camp., 144.

Ellenborough said: "Under such circumstances the purchaser has a right to expect a salable article, answering the description in the contract. Without any particular warranty, this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be that it shall be salable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill."

§ 154. So in Edwards *v.* Hathaway,[1] Sharswood, J., said: "The general rule at law is, that upon the sale of any article of merchandise, the seller does not become responsible for the quality of the article sold, unless he either expressly warranted the quality, or made a false and fraudulent representation in regard to it. This rule, however, is subject to some reasonable exceptions. It does not apply where the purchaser has no opportunity of inspecting the article. . . . I take it the same modification of the general rule applies when a coal dealer gives an order to the agent for coal to be sent to him from the mine; it is an implied

[1] Edwards *v.* Hathaway, 1 Phila. 547.

term of the contract that the coal shall be of a merchantable character. It would not be allowed in such a case, that the seller should in compliance with such an order, send an article which, though it might still pass muster by the name of coal, was composed of one half slate or stone." In Gaylord Manuf. Co. *v.* Allen,[1] Allen, J., said: "A contract to manufacture and deliver an article at a future day carries with it an obligation that the article shall be merchantable, or, if sold for a particular purpose, that it shall be suitable and proper for such purpose," quoting Hargous *v.* Stone,[2] Reed *v.* Randall,[3] Dutchess *v.* Harding.[4] The same rule was laid down in McClung *v.* Kelley,[5] viz: "The contract always carries with it an obligation that the article shall be merchantable; at least not to have any remarkable defect."

§ 155. In Hargous *v.* Stone,[6] Paige, J., reviewed at considerable length the cases, in which were involved the principle of implied warranties in sales, and, in speaking on this point, said: "Executory sales do not depend on the same principle as executed contracts of sale. The doctrine of implied warranty has properly no application to the former. Where a contract is executory, that is, to deliver

[1] 53 N. Y., 518.
[2] 1 Selden (N. Y.), 73.
[3] 29 N. Y., 358.
[4] 49 Ib., 321.
[5] 21 Iowa, 509.
[6] 1 Selden (N. Y.), 73.

an article not defined at the time, on a future day, whether the vendor has at the time an article of kind on hand, or it is afterwards to be procured or manufactured, the contract carries with it an obligation that the article shall be merchantable, at least of medium quality or goodness. If it comes short of this, the vendee may rescind the contract, and return the article after he has had a reasonable time to inspect it. He is not bound to receive or pay for it, because it is not the thing he agreed to purchase: Howard *v.* Hoey,[1] Hart *v.* Wright,[2] 2 Kent's Com. 480; Chanter *v.* Hopkins.[3] . . . But if the article is at the time of the sale in existence, and defined, and is specifically sold, and the title passes *in præsenti* to the vendee, there will be no implied warranty that the article is merchantable. . . . Where the sale is executory, if the goods purchased are found on examination to be unsound, or not to answer the order given for them, the purchaser must immediately return them to the vendor, or give him notice to take them back, and thereby rescind the contract, or he will be presumed to have acquiesced in the quality of the goods: 2 Kent. Com. 480; Fisher *v.* Samuda;[4] Hopkins *v.* Appleby,[5] Milner *v.* Tucker.[6]

[1] 23 Wend. (N. Y.), 350. [2] 17 Ib., 277.
[3] 4 M. & W., 399. [4] 1 Camp., 190.
[5] 1 Stark, 388. [6] 1 C. & P., 15; 23 Wend. (N. Y.), 352.

§ 156. In Spurr *v.* Albert Mining Co.,[1] where the defendants had agreed to supply the plaintiffs with Albert coal from their mines for the purpose of being made into oil, the coal to be a good, clean coal; it was held the plaintiffs were entitled to receive coal of a fair merchantable quality. Here the cases were very elaborately reviewed by Ritchie, C. J., who also thought the case could be put on the ground of a delivery of a chattel other than that contracted for, and which the purchaser was not bound to take, and not alone on the ground of the implied warranty of fitness.

§ 157. In Hyatt *v.* Boyle,[2] the court, however, while recognizing the principle, limited its application to cases where an examination "*is impracticable*," and not to cases where examination is not impracticable, but is merely a question of inconvenience or labor.[3]

§ 158. The implied warranty of merchantability, in a sale of goods by description, is illustrated further by the cases in Chap. III., §§ 92–130, and,

[1] 2 Hannay (New Brunswick), 361.

[2] 5 G. & J. (Md.), 110.

[3] See, also, Hart *v.* Wright, 17 Wend. (N. Y.) 267, which was decided in 1837; but see the later New York cases, *supra*, in Chapter III., § 108.

being of universal acceptance, need not be further considered, in this respect; see, however, the cases in the note.[1]

## II. *Sale by Sample.*

§ 159. Where the sale is by sample, which may be considered, in some respects, and for certain purposes, as a sale by description, there is not usually an implied warranty of merchantability; for the seller, by exhibiting the sample, and impliedly agreeing to bind himself, that the bulk of the goods sold shall be equal to the sample, is thus supposed to relieve himself from all other liability in the matter, and therefore, to exclude from the contract the implied stipulation of merchantability, on the principle of, *expressum facit cessare tacitum.*[2]

§ 160. As in Parkinson *v.* Lee,[3] where the court held that, the warranty resulting from a sale by sample, could not be supplemented by a further warranty that the goods were merchantable.

[1] Bigge *v.* Parkinson, 7 H. & N. 955; Laing *v.* Fidgeon, 4 Camp. 169; Jones *v.* Bright, 5 Bing. 533; Shepherd *v.* Pybus, 3 M. & G. 868; Jones *v.* Just, L. R., 3 Q. B. 197; French *v.* Vining, 102 Mass. 132; Howard *v.* Hoey, 23 Wend. (N. Y.) 350; Kohl *v.* Lindley, 39 Ill. 195; Brantley *v.* Thomas, 22 Tex. 270.

[2] See *infra*, §§ 184, 211, 212, 262–265.

[3] 2 East, 314. See remarks of Brett, J., in Randall *v.* Newson, L. R. 2 Q. B. D. 102.

§ 161. In Sands *v.* Taylor,[1] Spencer, J., delivering the opinion of the majority of the court, said: "The sample by which the defendants purchased was a fair exhibition of the quality of wheat of which the cargo consisted; it was taken out in the usual manner, by the plaintiff's agent running his arm down and drawing out the sample; and there is no pretence that there was any difference between the sample and the cargo, except that the latter was treated in a manner incident to every cargo of southern wheat. This deterioration of the cargo, and which undoubtedly prevented its malting, was a fact against which the exhibition of the sample did not warrant, and it is a fact with which the defendants must be presumed to be acquainted; for the law will presume every dealer in articles brought to market acquainted with all the circumstances usually attendant on cargoes composed of these articles. . . . The defendants' ground of refusal to receive the residue of the cargo, after a part had been delivered, is not that there has been anything represented by the exhibition of the sample unfair in itself, and deceptive, but that the defendants themselves made the purchase without a competent knowledge of the usual and customary course of the trade. This, I think,

[1] 5 John. (N. Y.), 404.

is what they cannot be permitted to take advantage of."

§ 162. But if the evidence discloses a reason why, or, that the intention of the parties was, that this implied warranty should not be excluded, the rule may be otherwise. This principle may be well illustrated by Gardiner *v.* Gray,[1] and Mody *v.* Gregson.[2]

§ 163. In the former case, Lord Ellenborough said the sale was not by sample, for "the sample was not produced as a warranty that the bulk corresponded with it, but to enable the purchaser to form a reasonable judgment of the commodity. . . . and, under such circumstances, the purchaser has a right to expect a *salable* article, answering the description in the contract."

§ 164. In Mody *v.* Gregson, the sale was of a lot "of shirtings," at so much per piece, each piece weighing so many pounds. The goods, however, contained a foreign substance, introduced solely to increase their weight, and were delivered and accepted in England, and shipped to Calcutta, where the defect was discovered. By an ordinary inspection the existence of this substance could not be detected in the sample, or in the goods delivered. It was held that, as the sample did not disclose the defect, and therefore falsely repre-

[1] 4 Camp., 144.

[2] L. R., 4 Ex. 49.

sented a salable article, and as the goods were sold to order, and not inspected, taken in consideration with the stipulation that the goods should be of a certain weight, which would have insured a salable article, there was substantially an implied stipulation of merchantability.[1]

§ 165. So, in Pennsylvania, in Boyd *v.* Wilson,[2] where it was lately decided that, in a sale by sample, there is no implied warranty that the goods in bulk shall correspond with the sample, it was intimated that probably there would be implied a warranty of merchantability; and at page 325 Agnew, C. J., said: "This being the nature of the sale, the sample became a standard only of the kind, and *that the goods were merchantable.* So long as the commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty. If it be wholly unmarketable, such as cannot be considered merchantable, *probably* a different conclusion would be reached, because an unmarketable article is substantially different in kind from one that is salable in the market."

[1] The decision might perhaps have been sustained on the ground that, in a sale by sample, there is an implied warranty against secret defects, when the seller is the manufacturer; see the remarks of Willes, J., in this case, and of Brett, J., in Heilbutt *v.* Hickson, L. R. 7 C. P. 438.

[2] 83 Pa. St., 325.

§ 166. In Wells *v.* Spears,[1] it was held also that an express warranty of title did not exclude an implied warranty of soundness.

## SECTION III. THE IMPLIED WARRANTY, WHERE THE SELLER'S SKILL IS SPECIALLY RELIED UPON IN THE PURCHASE, THAT THE GOODS SOLD SHALL BE SUITABLE FOR THE SPECIAL PURPOSE, FOR WHICH THEY ARE INTENDED BY THE BUYER; PROVIDED THE SELLER BE INFORMED OF IT, AT THE TIME THE ORDER IS GIVEN.

### I. *Sale of Chattels Generally.*

§ 167. Where a manufacturer or dealer contracts to supply an article, which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is an implied warranty that it shall be reasonably fit for the purpose to which it is to be applied, since here, the buyer does not purchase upon his own judgment, but relies upon that of the seller.[2]

[1] 1 M'C. (S. C.), 421; see, also, Hughes *v.* Banks, ib. 537.

[2] See Jones *v.* Just, L. R. 3 Q. B. 197. In the sale of a patent, there is no implied warranty of utility, beyond that the invention shall be capable of application, beneficial, and practical, not frivolous or injurious; Nash *v.* Lull, 102 Mass. 162; see Palmer's App., 96 Pa. St. 106; Green *v.* Stuart, 7 Tenn. 421.

§ 168. In Gray *v.* Cox[1] [1825], Abbott, C. J., stated he was of the opinion, "that if a person sold a commodity *for a particular purpose*, he must be understood to *warrant it reasonably fit* and proper for such purpose;" and in Jones *v.* Bright,[2] in 1829, this rule of Abbott, C. J. (Lord Tenterden), was adopted. Serjeant Ludlow, on argument, said the question is "whether the law will, according to the dictum of Lord Tenterden, in Gray *v.* Cox, lay upon the seller or manufacturer an obligation, to warrant in all cases, that the article which he sells shall be reasonably fit and proper for the purpose for which it is intended; . . . and render him responsible for all the consequences which may result, if it shall be found not to answer the purpose for which it was designed; and *that, on account of some latent defect of which he was ignorant, and which shall not be proved to have arisen from any want of skill on his part, or the use of improper materials, or any accident against which human prudence might have been capable of guarding him.*" Best, C. J., replied: "I wish to put the case on a broad principle. If a man sells an article, he thereby warrants that it is merchantable, that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants it fit for that purpose. . . . Whether or not an article has been

[1] 4 B. & C., 108, 115.

[2] 5 Bing., 533, 540.

sold for a particular purpose is, indeed, a question of fact; but if sold for such purpose, the sale is an undertaking that it is fit. . . . The law then resolves into this, that if a man sells generally, he undertakes that the article sold is fit for *some* purpose; if he sells it for a particular purpose, he undertakes that it shall be fit for that particular purpose."

§ 169. In Brown *v.* Edgington,[1] plaintiff sent to defendant's shop for a "crane rope," and the defendant's foreman went to the plaintiff's premises for the dimensions of the rope, was shown the crane, and was told the rope was wanted for the purpose of raising pipes from the cellar. The rope proved insufficient. Held, the seller was liable, and Tindal, C. J., thus put the rule: "It appears to me to be a distinction well founded, both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon the judgment of the seller, and informs him of the use to which the article is tobe applied, it seems to me the transaction carries with it an implied warranty that the thing furnished shall be fit and proper for the purpose for which it was designed." His Lordship

[1] 2 M. & G., 279.

added that he could not see any great difference between the case where the seller was a manufacturer or dealer, though this was a dictum, as the seller had undertaken to have the rope made.

§ 170. The principle is further well illustrated by the very able opinion of Brett, L. J., in Randall *v.* Newson,[1] of which extracts will be given at some length. This was a sale by the defendant, a coach builder, to the plaintiff, of a pole for the plaintiff's carriage. The pole broke in use, and the jury found that the pole was not reasonably fit for the carriage, but that the plaintiff had been guilty of no negligence. Held, the plaintiff was entitled to recover for the value of the pole, and also for damage to the horses, if the jury, in the second trial, should be of opinion that the injury to the horses was the natural consequence of a defect in the pole. The court in this case also held that, the limitation as to latent defects, introduced by Readhead *v.* Midland Ry. Co.,[2] does not apply to the sale of a chattel, but that where the sale was of an article for a special purpose, the vendor was bound that the article should be reasonably suitable therefor, and that there was no distinction between latent and discoverable defects. Brett, L. J., said: "The question is, what, in such a contract, is the implied undertaking of the seller as to the efficiency of the

[1] L. R. 2 Q. B. D., 102. [2] L. R. 4 Q. B., 379.

pole? Is it an absolute warranty that the pole shall be reasonably fit for the purpose, or is it only partially to that effect, limited to defects which might be discovered by care and skill? . . . The earliest case seems to be Parkinson *v.* Lee[1] [1802]. It is sufficient to say of it, that either it does not determine the extent of a seller's liability on the contract, or it has been overruled. Neither can the case of Fisher *v.* Samuda,[2] in 1808, be said to decide anything. The first cases of importance are Gardiner *v.* Gray,[3] and Laing *v.* Fidgeon,[4] in 1815. . . . In Gardiner *v.* Gray the contract was for the purchase and sale of 'waste silk.' . . . From that it is implied that it is, or in other words, it is assumed that it might be, specifically described as *salable waste silk.* . . . The principle is that the commodity offered must answer the description of it in the contract. Laing *v.* Fidgeon is to the same effect." His Lordship then cited Jones *v.* Bright,[5] Brown *v.* Edgington,[6] Wieler *v.* Schlizzi,[7] Nicol *v.* Godts,[8] and Josling *v.* Kingsford,[9] approvingly, and added: "I have cited these cases, and the principles laid down in them, in order clearly to ascertain what is the primary or ultimate rule,

[1] 2 East, 314. [2] 1 Camp., 190. [3] 4 Camp., 144.
[4] 6 Taunt., 108. [5] 5 Bing., 533.
[6] 2 M. & G., 279. [7] 17 C. B., 619.
[8] 10 Ex., 191. [9] 13 C. B. N. S., 447.

from which the rules, which have been applied to contracts of purchase and sale of somewhat different kinds, have been deduced. Those different rules, as applied to such different contracts, are carefully enumerated and recognized in Jones *v.* Just.[1] In some contracts the undertaking of the seller is said to be only that the article shall be merchantable; in others, that it shall be reasonably fit for the purpose to which it is to be applied. In all, it seems to be, or is assumed or expressly stated, that the fundamental undertaking is that the *article offered or delivered shall answer the description of it contained in the contract.* That rule comprises all the others; they are adaptations of it to particular kinds of contracts of purchase and sale. You must, therefore, first determine from the words used, or the circumstances, what, in, or according to, the contract, is the real mercantile or business description of the thing, which is the subject-matter of the bargain of purchase or sale, or, in other words, the contract. If that subject-matter be merely the commercial article or commodity, the undertaking is, that the thing offered or delivered shall answer that description—that is to say, shall be that article or commodity, salable or merchantable. If the subject-matter be an article or commodity to be used for a particular pur-

[1] L. R. 3 Q. B., 197.

pose, the thing offered or delivered must answer that description—that is to say, it must be that article or commodity, and reasonably fit for the particular purpose. The governing principle, therefore, is that the thing offered and delivered under a contract of purchase and sale, must answer the description of it which is contained, . . . or would be so contained, if the contract were accurately drawn out. . . . If the article or commodity offered or delivered does not in fact answer the description of it in the contract, it does not do so more or less because the defect in it is patent, or latent, or discoverable."[1]

§ 171. The case, where the vendor's skill is relied upon must, however, be distinguished from cases where, though the special use to which the goods ordered are intended to be applied, is communicated to him, yet the buyer buys on his own judgment.

§ 172. Thus in Jones *v.* Just,[2] Mellor, J., said: "Where a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that

[1] See, also, Jones *v.* Just, L. R. 3 Q. B. 197, approved by Brett, L. J., in this case.

[2] Ibid.

it shall answer that particular purpose intended by the buyer, Chanter *v.* Hopkins,[1] Ollivant *v.* Bayley,"[2] and in Port Carbon Iron Co. *v.* Groves,[3] Read, J., said, quoting (1 Pars. on Cont., 586): "If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle has been carried very far. It must, however, be limited to cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, although this be intended for a special purpose."

§ 173. The following are examples of the general rule.

(*a*) *Vendor's Skill relied upon.*

§ 174. In Beals *v.* Olmstead,[4] defendant sold to plaintiff a lot of hay, and offered to let plaintiff examine the hay in his barn; this the plaintiff declined to do, saying he could not tell by that, but he wished it for his oxen during spring and summer while at work at a railroad, and defendant said it was good hay, cut around the barn. On removing the covering, plaintiff found the hay was worthless, and was not such as could have been cut around the barn. The court said, *inter alia:* "The

[1] 4 M. & W., 399.
[2] 5 Q. B., 288.
[3] 68 Pa. St., 149.
[4] 24 Vt., 114.

hay was bought for a particular use, and the defendant knew plaintiff would not buy an inferior article. The sale of the hay then for this particular use ordinarily implies a certainty that it is fit for this use."

§ 175. In Murray *v.* Smith,[1] plaintiff sold certain barrels of lampblack to the defendant, the latter saying he must be very particular in having "black" that would make printers' ink; that black for carriage use would be of no use; that he must have lampblack for printing ink. The plaintiff knew defendant was a manufacturer of printing ink, and he sold the "black" to him for that purpose. The barrels were not examined. Held, a warranty that the "black" should be suitable for the manufacture of printing ink.

§ 176. In Park *v.* Morris Axe and Tool Co.,[2] the plaintiffs, *manufacturers of steel*, at Pittsburgh, sold to the defendants, *manufacturers of axes*, ten tons of steel. Held, the *name of the defendants' firm* was notice to plaintiffs of the use intended for the steel. Mullin, P. J., said: "Parsons, in his work on Contracts, vol 1, p. 469, says: 'If a thing be ordered of the manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for

[1] 4 Daly (N. Y.), 277. [2] 4 Lansing (N. Y.), 103.

that purpose.' The plaintiffs were *manufacturers*, and the defendants ordered the steel for the purpose of being made into axes. The case is thus brought within the principle asserted by Parsons. . . . The name of defendants' company was '*Axe and Tool Company*.' This was notice to plaintiffs of the uses to which the steel was to be applied; and the warranty must be held to be, that the steel would make either axes or tools, etc."[1]

§ 177. In Bigge *v.* Parkinson,[2] the defendant, a provision dealer, had made a written order to the plaintiff, as follows: "I hereby undertake to supply your ship, the Queen Victoria, to Bombay, with troop stores, . . . guaranteed to pass survey of the Honorable East India Company's officers, and also guarantee the qualities as per invoice." It was contended that the express warranty excluded any implied, and that, at any rate, no implied warranty was raised, but the court held the guarantee to be an express condition, and, quoting "Chitty on Contracts," at page 417 (ed. 1881), that "where a buyer buys a specific article, the rule of *caveat emptor* applies; but where the buyer orders goods

[1] See, also, Freeman *v.* Clute, 3 Barb. (N. Y.) 424; Bartlett *v.* Hoppock, 34 N. Y. 118; County *v.* Wade, 12 U. C. Q. B. 614; Gilson *v.* Bingham, 43 Vt. 410; Brown *v.* Murphee, 31 Miss. 91.

[2] 7 H. & N., 955.

to be supplied, and trusts to the judgment of the sellers to select the goods which shall be applicable to the purpose for which they are intended, which is known to both the parties . . . there is an implied warranty that they are fit for that purpose; and there is no reason why such a warranty should not be implied in the case of a sale of provisions."

§ 178. In Shepherd *v.* Pybus,[1] where a builder sold a barge, inspected by the buyer when completed, though not during the process of building, as no opportunity was given; it was held that, there was an implied warranty on the seller's part, as he was a manufacturer, against such secret default as rendered the barge unfit for the reasonable use of an ordinary barge. There was, however, no warranty implied for any special use intended by the buyer; but this was on the ground that no evidence of distinct notice was given to the seller when the barge was ordered.

§ 179. In French *v.* Vining[2] a party sold hay to plaintiff, on which white lead had been spilt, the plaintiff being ignorant thereof, in consequence of which, when used by plaintiff for feeding his cow, it caused death. On the trial of an action for damages for the death of the cow, the judge ruled that "if the cow died in consequence of eating the

[1] 3 M. & W., 868. [2] 102 Mass., 132.

paint adhering to the hay sold by the defendant, the plaintiff might recover, although the defendant did not know or believe that there was paint upon the hay; and that the defendant was bound to use the utmost care in separating the paint from the hay so sold." Ames, J.: "It may be, perhaps, more accurate to say that, independently of any express and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller, differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail, may be presumed to have a general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things sold are at least wholesome and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use, would be enough to sustain an action against him for deceit, if he had not disclosed the true state of the facts. The buyer has a right to suppose that the thing which

he buys, under such circumstances, is what it appears to be, and such purchases are usually made with a reliance upon the *supposed skill* or *actual knowledge* of the vendor. In the case at bar, the plaintiff bought the hay in small quantities, and the defendant must be considered as knowing, generally, the kind of use to which it was to be applied. The act of sale, under such circumstances, was equivalent to an express assurance that the hay was suitable for such use."

§ 180. In Beer *v.* Walker[1] it was held, where rabbits were sent, on a weekly order, from a wholesale dealer in London to a retail dealer at Brighton, and the rabbits were sound when shipped, but unfit for food when they reached their destination, that there was an implied warranty that they should be suitable for food till they reached the defendant at Brighton.

§ 181. In Hoe *v.* Sanborn[2] the court held that, on a sale by a manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture; but where the latent defect is in the materials used the manufacturer is not liable, unless he knew of the defect.

§ 182. But in Rodgers *et al. v.* Niles,[3] where N.

[1] 46 L. J. C. P., 677. [2] 21 N. Y., 552. [3] 11 Ohio St., 48.

& Co. had agreed with R. & Co. to manufacture and deliver to the latter, at a future time, three steam boilers to run the engines in their rolling mills; it was held that there was an implied promise on the part of the vendors, that such boilers should be free from all such defects of material and workmanship, *latent or otherwise*, as would render them unfit for such use. In this case the authorities on this subject were reviewed with much ability by Scott, J. He said at page 52: "The general rule of the common law undoubtedly is, that upon an executed sale of specific goods, the vendor will not be held liable for any defects in the quality of the articles sold, in the absence of fraud or express warranty. Where the purchaser is not deceived by any fraudulent representations, and demands no warranty, the law presumes that he depends on his own judgment in the transaction, and applies the maxim '*caveat emptor*.' But to this general rule the requirements of manifest justice have introduced sundry exceptions, of which some are as well settled as the rule itself, while, as to others, the authorities cannot be easily reconciled. We do not propose an investigation of the subject further than is demanded by the case before us. The principal, if not the sole, exceptions to the rule are found in cases, where it is evident that the purchaser did not rely on his own

judgment of the quality of the article purchased; the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use. Thus, it is said by Mr. Story, 'when an examination of goods is, from their nature or situation at the time of the sale impracticable, a warranty will in general be implied that they are merchantable. Thus, if goods be at sea, or not arrived; or if they fill the hold of a ship, so that nothing but the surface can be seen; or if they be in bales, so that an examination of the centre cannot be made without tearing each bale to pieces; the seller will be understood to warrant them merchantable, and of the quality demanded and expected by the buyers:' Story on Cont., sect. 834.

"It is true that the warranty of merchantable quality has, in several cases, been held to be limited to cases where the examination is *impracticable*, and not merely *inconvenient:* Hyatt *v.* Boyle;[1] Hart *v.* Wright.[2] So, also, the implication of warranty is said not to extend to cases where an examination, though practicable, would be fruitless on account of the latent character of

[1] 5 G. & J. (Md.), 110. [2] 17 Wend. (N. Y.), 267.

the defects; but only to those cases in which there can be no examination: 1 Pars. on Cont., 466. The same writer, however, says 'one exception to the rule of *caveat emptor* springs from the rule itself. For a requirement that the purchaser should "beware," or should take care to ascertain for himself the quality of the thing he buys, becomes utterly unreasonable, under such circumstances, which make such care impossible.' The vendor's liability on an implied warranty, in the case of articles sold for a particular purpose, is illustrated by the cases of Jones *v.* Bright;[1] Brown *v.* Edgington;[2] Beals *v.* Olmstead;[3] Brenton *v.* Davis.[4] Other cases have imposed proper limitations on this doctrine, as in the case of Chanter *v.* Hopkins,[5] and Ollivant *v.* Bagley.[6] In these cases it was held that where a 'known and ascertained article' is ordered and furnished, though intended for a particular use, the liability of the maker and vendor extends only to defects in the materials and workmanship, and not to such as arise from the principle or mode of construction. With respect to the doctrine that a sale made for a particular purpose, implies a warranty that the thing sold shall be fit for that pur-

[1] 5 Bing., 533.
[2] 2 M. & G., 279.
[3] 24 Vt., 114.
[4] 8 Blackf. (Ind.), 317.
[5] 4 M. & W., 399.
[6] 5 Q. B., 288.

pose, it is said in 1 Smith's L. Cas. 250, that 'the sounder view seems to be that no engagement of this sort can be implied against the vendor, save where the contract is partially or wholly executory; and that in this case it is not in the nature of a warranty but of an implied stipulation, forming part of the substance of the contract.' And a marked distinction will be found to pervade all the authorities, between an *executed* sale, where the property passes *in præsenti*, and an *executory* sale, for the delivery on a future day, of an article not specifically defined or selected at the time. In the latter case, it makes no difference whether the vendor have an article of the kind on hand, or it is afterward to be procured or manufactured. In neither case can the promisee be compelled to rest satisfied with an inferior article. Though, in the absence of express stipulation, he cannot insist that the article shall be of any special degree of fineness, yet he has a right to insist that it shall be of medium quality or goodness, free from such defects as would render it unmerchantable, or unfit for the purpose for which it is ordinarily used.[1] . . . This is, perhaps, not the case of an article agreed to be furnished for a special purpose. It does not

[1] Howard *v.* Hoey, 23 Wend. (N. Y.) 350; Brown *v.* Sayles, 27 Vt. 227; Story on Cont., sec. 834; Broom's Leg. Max., 614.

appear that the plaintiff's mills required boilers of a peculiar quality, and that this was known to the defendants. But they did know that the boilers were intended to be used for the purpose to which they are ordinarily applied; . . . and they contracted to build them with reference to this, their usual purpose and use. . . . It was well known by the defendants at the time of making the contract, that the plaintiffs desired to procure steam boilers fit, both in material and workmanship, for the use to which such boilers are ordinarily applied. They agreed to supply the plaintiffs' demand in this behalf. . . . If they have failed, *through defect of material procured by them, or of workmanship, their contract is broken, whether such defects be latent or visible, and however honest their intentions may have been.*[1] Hoe *v.* Sanborn was distinguished as being an executed contract.[2]"

[1] *Supra.*

[2] Compare the remarks of Scott, J., in this case, with those of Brett, J., in Randall *v.* Newson, L. R. 2 Q. B. D. 102.

[3] See also Macfarlane *v.* Taylor, L. R. 1 Scotch Appeals, 245; Smith *v.* Baker, 40 L. J. (N. S.), 261; Bigelow *v.* Boxall, 38 U. C. Q. B. 452; Snelgrove *v.* Bruce, 16 U. C. C. P. 561; Hanger *v.* Evans, 38 Ark. 334; Robson *v.* Miller, 12 S. C. 586; Gammell *v.* Gunby, 52 Ga. 504; Wilcox *v.* Owens, 64 Ga. 601; Gerst *v.* Jones, 32 Grat. (Va.) 518; White *v.* Miller, 71 N. Y. 118; Wolcott *v.* Mount, 38 N. J. L. R. 496; Taylor *v.* Cole, 111 Mass. 363; Hylton *v.* Symes, 7 Phila. 96; Howard *v.* Hoey, 23 Wend. (N. Y.)

(*b*) *Vendor's Skill not relied upon.*

§ 183. Emmerton *v.* Matthews,[1] and Dounce *v.* Dow,[2] are examples of the rule where the seller knows the intended use of the article purchased, but his skill or knowledge is not relied upon by the buyer at the sale. In Emmerton *v.* Matthews, the defendant, a general dealer in Newgate Street, London, sold to the plaintiff, a retail dealer, a carcase consigned to him. The meat was seemingly in good condition, was seen by the plaintiff and purchased on his inspection. There was no warranty, and the meat turned out, when cooked, to be unfit for food; but the court held there was no implied warranty, as the sale was by inspection. In Dounce *v.* Dow, defendants, manufacturers of agricultural implements, ordered of plaintiffs, dealers, but not manufacturers of pig iron, "double X pipe iron." Plaintiff had no such iron in stock, but obtained it of a manufacturer, and shipped to defendants, knowing the use for which it was intended. The iron was found to be "double X pipe iron," but of very poor

350; Merrill *v.* Nightingale, 39 Wisc. 247; Wilson *v.* Dunville, L. R. 4 Ir. 249; Baker *v.* Lyman, 38 U. C. Q. B. 498; Van-Wycke *v.* Allen, 69 N. Y. 61; Wharton on Contracts, § 221; Robertson *v.* Amazon Tug Co., L. R. 7 Q. B. D. 598.

[1] 7 H. & N. 586. [2] 64 N. Y., 411.

quality, and when used for casting, the castings were worthless. The court held that, as defendants had kept for some time, and used the iron without testing it, they could not rescind, and that as the plaintiff's skill was not relied upon in the purchase, there was no implied warranty of fitness for any purpose. Mullin, J., in the court below, 6 T. & C. 653, said: "It is urged by defendants' counsel that upon the facts proved, the court should have found that plaintiff warranted the iron to be suitable for making such castings as defendants were engaged in making. Plaintiff knew the use to which defendants designed to put the iron when delivered, but that furnishes no ground for implying a warranty that the iron was suitable for such use, as he did not manufacture it: Bartlett *v.* Hoppock.[1] It is unnecessary to inquire what the rule of law would be if the plaintiff had been the manufacturer of the iron, and knew the use to which defendants designed to put it? He is not shown to have skill in iron. He was a mere dealer in the article, purchasing the various brands of iron and selling them by the name by which they were known in the market, and left the purchasers to ascertain the quality for themselves. No warranty is implied in such a case." The judgment was affirmed on appeal. Church, C. J.,

[1] 34 N. Y., 118.

delivering the opinion, said: "If the defendants had ordered double X pipe iron, which was tough and soft, and fit for manufacturing agricultural implements, and the plaintiffs had agreed to deliver iron of that quality, a warranty would have been established, which, probably, within the case of Day *v.* Pool,[1] would have survived the acceptance of the article. Here both parties acted in good faith. The defendants ordered simply double X pipe iron, supposing that such iron was always tough and soft. The plaintiff forwarded the iron under the same impression. The iron proved to be brittle and hard, and the question is, which party is to bear the loss?" (The opinion of the court below is given in full in Dounce *v.* Dow, 6 Thomp. & Cook, N. Y. S. C. Rep. 653). In the above case it will be seen the vendor's skill was not relied on, but the vendee bought on his own judgment.[2]

## II. *Sale by Sample.*

§ 184. In a sale by sample, as has been stated, there is usually no implied warranty of merchant-

[1] 52 N. Y., 416; see, also, Calhoun *v.* Vechio, 3 Wash. C. C. 165.

[2] See, also, Robertson *v.* Amazon Tug Co., L. R. 7 Q. B. D. 598; Palmer's Appeal, 96 Pa. St. 106; Matthews *v.* Hartson, 3 Pitts. 86.

ability or fitness,[1] on the principle that the warranty that is implied in a sale by sample excludes the idea of all others. It has, however, been pretty strongly intimated, by very high authority, that the sample exhibited by the seller must be taken as free from secret defects, in certain cases, as where the seller is the producer or manufacturer.[2]

§ 185. Thus, in Heilbut *v.* Hickson,[3] the facts which have been substantially narrated on page 141, Bovill, C. J., delivering the judgment of the court, said: "It was contended for the defendants that as the *sample shoe* contained paper, and the French government would have rejected the shoes if they had been precisely in accordance with the sample in that respect; the damages, and especially the loss of profits, did not result from the breach of warranty in the shoes not being equal to the sample. But the fact of the improper fillings in the sole of the *sample shoe* was a *hidden* defect, and appears to have been unknown to all parties. It could not be seen or discovered by any ordinary

[1] See *supra*, §§ 159–166; and *infra*, §§ 211, 262.

[2] See *supra*, § 146; *infra*, § 212; Heilbut *v.* Hickson, L. R. 7 C. P. 438; see, also, remarks of the court in Grimoldby *v.* Wells, L. R. 10 C. P., 391; see Lucy *v.* Mouflet, 5 H. & N. 233; Mody *v.* Gregson, L. R. 4 Ex. 49.

[3] L. R. 7 C. P., 438.

examination of the shoes. And the letter of the 11th of February was directed expressly to the point of paper being in the shoes, and, in our opinion, gave the right to reject the shoes on that ground, and entitles the plaintiffs to recover the loss of profits which would have accrued if the shoes had been accepted by the French authorities." And see, also, the remarks of Brett, J., in the same case. In Dickinson *v.* Gay[1] [1863], it was insisted that in a sale by sample, by one not the manufacturer, a local usage was admissible, to show that the seller was responsible, where both the sample and goods contained secret defects, unknown to him at the time of the sale. Chapman, J., said: "The plaintiff is not a manufacturer, and therefore no implied warranty of a manufacturer exists in the case. The sale was between merchants, who are bound by the legal usages of merchants;" and evidence of the usage was held illegal and inadmissible by the court. It is evident from the remarks of Chapman, J., that had the sale been by a manufacturer or producer, a different conclusion might have been reached, or, at least, that the question was arguable; and, perhaps, on the dicta of these cases, and on the general principle that a manufacturer or producer is generally liable for secret

[1] 7 Allen (Mass.), 29.

defects, it would not be too much to say, that, *semble*, where a producer or manufacturer contracts to furnish goods according to the sample exhibited, the sample must be taken to be free from secret defects, unknown to the parties at the time of the sale.

### III. *Sale of Provisions.*

§ 186. It has been asserted that, in the sales of provisions, there is an implied warranty that they are sound and wholesome, at least, where the sale is for domestic or immediate consumption."[1]

§ 187. In Blackstone's Commentaries[2] it is stated as a sound and elementary principle, that in a contract for the sale of provisions, it is implied that they are wholesome, and if they be not, an action on the case for deceit lies against the vendor. No authority, however, is given for this proposition. And in Moses *v.* Mead,[3] Bronson, C. J., observed, "that the language of the commentator leaves somewhat doubtful, whether his mind was not upon a *deceit* in the sale, which stands on a different footing from a warranty." Mr. Benjamin, in his

[1] Story on Sales, § 373 [1847]; Remarks of the Annotator to the third American edition of Benjamin on Sales, Bennett, at page 664 [1881]; Chitty on Contracts, page 419 [ed. 1881].

[2] 3d vol., 166. [3] 1 Denio (N. Y.), 378.

very able work on Sales,[1] in criticizing this passage from Blackstone, says: "He gives no authority, and the proposition clearly assumes knowledge of the unwholesomeness on the part of the vendor, for that knowledge is an essential element in the action for deceit, is settled in Pasley *v.* Freeman,[2] and the cases there cited, and others which have since been determined on its authority. In Chitty on Contracts,[3] the learned author says 'that it appears that in contracts for the sale of provisions, by dealers and common traders in provisions, there is an implied warranty that they are wholesome.' The above quoted passage from Blackstone is given as the authority for this statement, and in the note it is suggested that Emmerton *v.* Matthews,[4] so far as it contradicts this proposition, is not law;" and after quoting at length from the opinion of Baron Parke, in Burnby *v.* Bollett,[5] in which the authorities were reviewed, and which I shall presently cite, the learned author concludes by saying: "It is submitted that it results clearly from these authorities, that the responsibility of a victualler, vintner, brewer, butcher, or cook, for

[1] At page 875, 4th Amer. edition. Corbin [1883].

[2] 3 T. R., 51.

[3] Cited *supra*, p. 419 (ed. 1881).

[4] 7 H. & N., 586, cited *infra*, § 189.

[5] 16 M. & W., 644.

selling unwholesome food, does not arise out of the contract or implied warranty, but is a responsibility imposed by statute, that they shall make good any damage caused by their sale of unwholesome food." In his very valuable Treatise on Contracts, at page 329,[1] Dr. Francis Wharton remarks: "There has been much discussion on the question whether there is an implied warranty of wholesomeness in sales of provisions. We have the high authority of Blackstone to this effect; and in Chitty on Contracts the same position is broadly affirmed. We have numerous authorities tending, in this country, in the same direction, so far as concerns articles sold for domestic use; and this view is strengthened by the rulings in criminal prosecutions, that it is an indictable offence to expose for human food articles known to be unfit for such food. In England, however, it is now held that *there is no general implied warranty on sales of food*, except in cases of victuallers, butchers, and other common dealers in victuals, under the statute 51 Hen. III.,"[2] and the opinion of Mr. Benjamin is quoted.

§ 188. The subject was very elaborately discussed in Burnby *v.* Bollett,[2] quoted by Mr. Benjamin and Dr. Wharton, and the opinion of the

[1] Edition of 1882.

[2] Burnby *v.* Bollett, 16 M. & W., 644.

court will be given at some length. In this case, A., a farmer, bought, in the public market of a country town, from B., a butcher, who had a stall there, a carcase of a dead pig for domestic consumption, and left it hanging up, intending to return and take it away. C., another farmer, desiring to buy the pig, was referred to A. as the owner, and subsequently bought it of A., without a warranty. All the parties at the time of the sale were ignorant of any secret defects. The pig was measly, and became putrid and unfit for human food. The court held there was no warranty by A. to C., as the authorities cited limited the implied warranty to sales by victuallers, butchers, and other common dealers, in which A. was not included. Parke, B., however, said: "On the part of the plaintiff the argument was that the sale of victuals to be used for man's consumption differed from the sale of other commodities, and that the vendor of such, without fraud, would be liable to the vendee on an implied warranty. This position is apparently laid down in Keilway, 91; but the authorities there referred to in the Year Books 9 Hen. VI., 53 B., and 11 Edw. IV., 6 B., and others,[1] when well considered, lead rather to the conclusion that there is no other difference between the sale of food for man and other articles

[1] 7 Hen. IV., 16; 11 Hen. IV., 14, 1; 11 Hen. VI., 6, 18.

than this, viz., that victuallers and common dealers in victuals are not merely in the situation of common dealers in other commodities, nor are they liable under the same circumstances as they are, as if an order be sent to them to be executed, they are to be presumed to undertake the supply of food and wholesome meat; and they are likewise punishable as a common nuisance for selling corrupt meat by virtue of an ancient *statute*, and this certainly if they know the fact, and probably if they do not. Such persons are therefore civilly responsible to those customers to whom they sell such victuals, for any special particular injury by the breach of the law which is thereby committed. Lord Coke lays it down that all persons, as well as common dealers, are liable criminally for selling corrupt meat; . . . for by the statute 51 Hen. III., and 'by the statute made in the reign of Edw. I., it is ordained that none shall sell corrupt victuals;' and the statute of 51 Hen. VII. says that the Pillory, and Tumbril, and Assize of Bread and Ale, applies only to vintners, brewers, butchers, and victuallers; and among the other things, inquiry is to be made of the vintners' names, and if they sell a gallon of wine, or if any corrupted wine be in the town, or such is not wholesome for man's body; and if any butcher sell contagious flesh, or that died of the murrain;

or cooks that sell the unwholesome flesh. . . . Britton, who wrote after the statute 51 Hen. III., and following the same, saith: 'Puis soit enquys de ceux que achatent, per un manere de mesure et vendent per meinder mesure faux, et ceux soient punis comes vendours de vines et aussi ceux que serront attaintz de faux aunes et faux peys, et auxi de macegrieves,[1] et les gents que de usage vendent a trespassants mauveyse vians corrumpus et nacrus et autrement perillous a la saunty de home . . . encontre le fourme de nous statutes.' This view of the case explains what is said in the Year Book 9 Hen. VI. 53, that '*the warranty is not to the purpose;* for it is ordained that none shall sell corrupt victuals;' and in Roswell *v.* Vaughan,[2] where Tanfield, C. B., and Altham, B., say 'that if a man sells victuals which is corrupt without warranty, an action lies, because it is against the commonwealth.' That also explains the note of Lord Hale in 1st Fitzherbert's Natura Brevium, 94, that there is diversity between selling corrupt wines and merchandise; for there an action on the case does not lie without warranty; otherwise, if it be for a taverner or victualler, if it prejudice any. The defendant in this case was not dealing

[1] Macellarius, butcher or victualler.

[2] Cro. Jac., 196. Many of the old statutes on this point have been repealed by the statutes of 7 and 8 Vict., c. 24.

in the way of a common trader, and was not punishable by indictment for what he did. . . . He therefore falls within the reason of the former part of Lord Hale's distinction, . . . and he is not liable."

§ 189. In Emmerton *v.* Mathews,[1] a general dealer in Newgate Street sold to a retail dealer a carcase of meat, consigned to him seemingly sound, but which turned out to be bad and unfit for food. Held, no action lay on the implied warranty, as the sale was by inspection.

§ 190. In Smith *v.* Baker[2] [1878] it was held, following Emmerton *v.* Mathews, that where meat which had no discoverable defect, but which afterwards was found to be unfit for human food, was sold in a public market to a purchaser who selected it himself, there was not raised any implied warranty that the meat was sound or fit for food.

§ 191. The rule, then, in England, seems clearly to be, as stated by Dr. Wharton and Mr. Benjamin, that by the common law, in contracts for provisions, there is no implied warranty of soundness different from what would be implied in the sale of other commodities; and the remark of Sir William Blackstone, above quoted, must be under-

[1] 7 H. & N., 586, cited *supra*, § 183.

[2] 40 L. T. R. (N. S.), 261.

stood, either as being limited to the case of *knowledge* on the vendor's part, or as being incorrect.

§ 192. In the United States, one of the earliest cases is Bailey *v.* Nickols[1] [1796]. Here plaintiffs bought a quantity of barrel beef for exportation, which was properly marked by the inspector. When the cargo arrived in the West Indies, the beef was found to be tainted and unfit for sale, and the court held "that the defendant, by selling this beef for cargo beef, and asking and receiving a *sound price* for it, did warrant it to be such as the law prescribed under the denomination of cargo beef, and that it was good and sound." This case, however, it will be seen, really turned on different principles, viz., that a *sound price* implies a *sound article* and the principle of merchantability in a sale by description; and the decision evidently had no special reference in principle to the particular nature of the article sold; and later, in Dean *v.* Mason[2] [1822], the doctrine of a sound article for a sound price was considered as exploded.

§ 193. In New York, in the early case of Van Bracklin *v.* Fonda[3] [1815], on an action for damages for the delivery of diseased beef—*the animal having been slaughtered for fear she should die a natural death*—for domestic use, the court said:

[1] 2 Root (Conn.), 407.
[2] 12 John. (N. Y.), 468.
[3] 4 Conn. Rep., 428.

"In 3 Blackst. Com. it is stated as a sound and elementary proposition, that in contracts for provisions, it is always implied that they are wholesome; and if they are not, case lies to recover damages for the deceit. In the sale of *provisions for domestic use*, the vendor is bound to know that they are sound and wholesome at his peril. This is a principle not only salutary, but necessary to the preservation of health and life." In this case, however, there was, as appears, positive evidence of a fraudulent concealment, the animal being killed by the vendor to prevent a natural death from disease.

In the more recent case of Hart *v.* Wright[1] [1837], Cowen, J., said of Van Bracklin *v.* Fonda: "I am not aware of any other case in this State wherein a warranty of quality is engrafted on a sound price alone."

§ 194. In Massachusetts, in Emerson *v.* Brigham[2] [1813], Sewall, J., stated the law thus: "Justice Blackstone has classed the cases of deceit and breaches of express warranties in contracts for sales under the head of implied contracts. He says: 'In contracts for provisions it is always implied that they are wholesome; and in a sale with warranty, the law annexes a tacit contract, that if

[1] 17 Wend. (N. Y.), 367. [2] 10 Mass., 197.

the article be not as warranted, compensation shall be made to the buyer; . . . or if they be in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness.' It is obvious that, in this very general classification, the details and examples are very imperfectly introduced, and with some inaccuracy. *It is not implied in every sale of provisions that they are wholesome, any more than it is in sales of other articles,* where proof of a distinct affirmation seems in Justice Blackstone's opinion to be requisite. The contrary may be, and often is, understood between the parties; and it is only when the false representations, to be proved in the one case, may be presumed or taken to be proved in the other that the rule of law applies, and the remedy, as in a case of deceit, is allowed. An artifice must be proved to entitle the suffering party to the remedy, equivalent to a remedy upon an express warranty, as well in the case of provisions as in any other case. The difference is, that in the case of provisions, the artifice is proved, when a victualler sells meat *as fresh* to his customers at a sound price, which, at the time, was *stale and defective or unwholesome from the state in which the animal died.* For, in the nature of the bargain, the very offer to sell is a representation or

affirmation of the soundness of the article when nothing to the contrary is expressly stated; and his knowledge of the falsehood in this representation is also to be presumed from the nature and duties of his calling and trade. But, cases may be supposed where, this presumption being repelled by contrary evidence, the seller would not be liable; as where a different representation was made; and this is proved directly, or is necessarily to be presumed from the nature of the article, the state of the market, or other circumstances. *Indeed there is nothing to be inferred in a sale of provisions, which may not be inferred to a like purpose in other cases; where the calling or profession of the seller, the soundness of the price, and nature of the article sold, have been made the ground of decision.*"

§ 195. In Winsor *v.* Lombard,[1] Shaw, C. J., observed: "*It is supposed that a different rule applies to the case of all provisions from that applicable to other merchandise. This matter is well explained by* Mr. Justice Sewall, in Emerson *v.* Brigham, *supra.*"

§ 196. In Howard *v.* Emerson[2] [1872], a live cow was sold to a retail butcher, for use as food, and it was held there was no implied warranty that the cow was fit for food. Morton, J., in

[1] 18 Pick. (Mass.), 61. [2] 10 Mass., 320.

speaking of the exception, to the general rule contended for, in the case of an article sold for domestic use, said: "But we think that this *exception, if established, does not extend beyond the case of a dealer who sells provisions directly to the consumer for domestic use.* In such cases it *may* be reasonable to infer a tacit understanding which enters into the contract, that the provisions are sound. The relation of the buyer to the seller, and the circumstances of the sale, may raise the presumption that the seller impliedly represents them to be sound. But the same reasons are not applicable to the case of one dealer selling to another dealer."

§ 197. In Moses *v.* Mead,[1] Bronson, C. J., considered at some length this proposition: "We are referred," said he, "to the authority of Blackstone for another exception to the general rule, and it is insisted that on a sale of provisions, there is an implied warranty that they are wholesome. . . . The language of the commentator leaves it somewhat doubtful whether his mind was not upon a *deceit* in the sale, which stands on a different footing from a warranty. If he intended to affirm that the law implies a warranty of soundness in the sale of provisions, the remark is without any

[1] 1 Denio (N. Y.), 378.

support in the English adjudications. . . . The *dictum* of Blackstone has been directly overruled in Massachusetts (Emerson *v.* Brigham).[1] . . . The doctrine of Blackstone, with a very important qualification, was approved by the judge who prepared the opinion in Van Bracklin *v.* Fonda,[2] but that was plainly a case of fraud. The jury found that the beef was unsound and unwholesome, and that the defendant—the seller—knew the animal to be diseased. The case of Hart *v.* Wright[3] arose on a sale of provisions; and one member of the Court of Errors was for implying a warranty of soundness, but that opinion did not prevail. . . . Although the doctrine of Blackstone cannot be supported in its *whole extent, I am not disposed to deny that* on a sale of provisions for *immediate consumption*, the vendor may be held responsible, in some form, for the sound and wholesome condition of the articles which he sells." Here, the provisions were sold as merchandise, and the court said that no implied warranty existed.

§ 198. In Burch *v.* Spencer *et al.*[4] [1878], plaintiff's agent bought of defendant some pork for food, who denied the meat to be that of a boar (which

[1] 110 Mass., 320.
[2] 12 Johns. (N. Y.), 468.
[3] 17 Wend. (N. Y.), 267; 18 Ib., 449.
[4] 22 N. Y. Sup. Ct., 504.

is not sold for food as meat, but for lard, etc.). Here, the case again turned on the knowledge of the vendor, and the court held there was a warranty, and added: "I believe that this view of the case is in strict accordance with public policy, which requires that only articles that are sound, wholesome, and fit for use, shall *knowingly* be sold for food, and that in accordance with such policy, the law implies a warranty in all cases of an executed contract of sale of articles of food that the same are wholesome and fit for use as such, where the vendor has *personal knowledge of the quality and condition of the articles sold, not known to the purchaser, and that the party purchasing intends to use the articles for food, or to sell them to others to be used for the same purpose.*"

§ 199. In Osgood *v.* Lewis[1] there is a *dictum* that in a sale of provisions there is a warranty.

§ 200. In Ryder *v.* Neitge[2] the court said, the warranty, *if implied at all*, is implied only where the provisions are sold for consumption, or immediate use by the vendee, and not as merchandise, as in this case. And in Goad *v.* Johnson[3] [1871], Nicholson, C. J., after quoting, approvingly, Mr. Benjamin's conclusion on this subject, in his work

[1] 2 H. & G. (Md.), 495.
[2] 6 Heisk. (Tenn.), 340.
[3] 21 Minn., 70.

on Sales, referred to above, repudiated the idea that the sale of provisions affords any exception to the general rule of *caveat emptor* in sales, and said: "The case of selling unwholesome provisions for consumption, therefore, furnishes no exception to the rule that where there is no deceit or fraud on the part of the seller, and where the buyer inspects and buys upon his own judgment, he buys subject to the rule of *caveat emptor*, even if there were a latent defect in the chattel sold, equally unknown to seller and buyer, and hidden from detection by either."

§ 201. In Humphrey *v.* Comline,[1] it was held that in a sale of molasses in barrels, at the market price, to a grocer, there was no implied warranty, the molasses was fit for the purpose purchased, the barrels being present at the time of the sale, and subject to inspection.

§ 202. In Hyland *v.* Sherman,[2] Woodruff, J., said: "*As to the supposed warranty that the articles being provisions, they were suitable for food, if it be true that any such warranty is implied on a sale of food for domestic use*, it has been distinctly held that there is no such warranty when the provisions are sold as merchandise, to be sold again by the buyer: Moses *v.* Mead, *supra*."

[1] 8 Blackf. (Md.), 516. [2] 2 E. D. Smith (N. Y.), 234.

§ 203. In Michigan, in Hoover *v.* Peters,[1] it was, however, held that in a sale of provisions for immediate domestic use, a warranty of soundness is implied; here the court were not unanimous in their opinion, and besides the court below was reversed. And in Pennsylvania, in McNaughton *v.* Joy,[2] one of the Courts of Common Pleas held, on a sale of butter and potatoes for table use, there was always an implied warranty that they were fit for the purpose for which they were sold.[3]

§ 204. From a review of these American cases[4] we are led to conclude, though the judges have frequently said there is a distinction between the case of provisions sold to a consumer for domestic use, and when sold as merchandise, and that in the former case there is an implied warranty of soundness, and in the latter not; that, for the most part, this distinction is only supported by the *dicta* of individual judges, and where a warranty has been *held* to exist, it has been grounded on the actual deceit of the vendor. Often the *dicta* recognizing the above distinction have been doubted; and in some cases the distinction has been repudiated altogether; while of all the cases I have been able to consult, only two—Hoover *v.* Peters, and

[1] 18 Mich., 51. [2] 1 W. N. C. (Phila.), 470.

[3] See, also, 22 Amer. Law Reg., 231.

[4] Substantially all I could find upon the subject.

McNaughton *v.* Joy—appear to flatly rule that, in America, in a sale of provisions for immediate domestic use, there is an implied warranty of wholesomeness or soundness. The general current, then, of the American authorities, though with occasional deflections, appear to flow in the same channel as the English, and there is probably no warranty implied by law peculiar to provisions.

## SECTION IV. THE IMPLIED WARRANTY IN A SALE BY SAMPLE, THAT THE GOODS SOLD SHALL CORRESPOND IN BULK WITH THE SAMPLE EXHIBITED.

### I. *The General Rule.*

§ 205. Another very common warranty, that is implied by law, is the warranty in a sale by sample, that the quality of the mass or bulk of the goods sold shall be equal to, or correspond with, the sample exhibited. This rule is substantially universal.

§ 206. Thus in Parker *v.* Palmer,[1] Abbott, C. J., observed: "The words *per sample* are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality."

§ 207. In Leonard *v.* Fowler[2] it was held that, though, where goods are sold by sample, and there

[1] 4 B. & Ald., 387. [2] 44 N. Y., 289.

are no qualifying circumstances, there is an implied warranty that each package of the article shall correspond with the sample; yet, where the goods sold consist of several varieties and qualities of the same article, and the sample is made by mixing proportional parts of the different varieties and qualities, the warranty is, that the whole quantity, if mingled together, would be of a quality equal to the sample.[1]

### II. *The Existing Rule in Pennsylvania.*

§ 208. In Pennsylvania, however, the *existing* rule seems to be different, and the courts at present hold that in a sale by sample, the vendor is not bound to deliver goods equal in bulk to the quality of the sample shown, but only goods of the same *kind* or *species;* all gradations in quality being at the risk of the purchaser.

§ 209. Thus, in Fraley *v.* Bispham,[2] the facts of which are given *supra*, on page 109, where it appeared that a sale of fifty hogsheads of superior

[1] Hargous *v.* Stone, 1 Selden (N. Y.), 73; Parkinson *v.* Lee, 2 East, 314; Parker *v.* Palmer, 4 B. & Ald. 387; Merriman *v.* Chapman, 32 Conn. 146; Bradford *v.* Manly, 13 Mass. 139; Borrekins *v.* Bevan, 3 Rawle (Pa.), 37; Leonard *v.* Fowler, 44 N. Y. 289; Barnard *v.* Kellogg, 10 Wall. 383; Brantley *v.* Thomas, 22 Tex. 270; Hubbard *v.* George, 49 Ill. 275; Gunther *v.* Atwell, 19 Md. 157; Graff *v.* Foster, 67 Mo. 512; Boothby *v.* Plaisted, 51 N. H. 436; Gill *v.* Kaufman, 16 Kan. 571.

[2] 10 Pa. St., 320.

sweet-scented Kentucky leaf tobacco was made, either by description or sample, the court held that the terms of the sale were satisfied by the delivery of Kentucky leaf tobacco, not equal to the sample, but ill-flavored, rotten, heated, unsalable, and not sweet-scented.

The same principle was laid down in the recent case of Boyd *v.* Wilson[1] [1877]. Here, a corn broker effected a sale for A. of 850 cases of "king's brand" of canned corn to B., who had first been furnished with a sample of three cans for trial, and had found them to be in good condition. After the delivery, the corn was found to be greasy and sour, and, in part, unfit for use. It was proved that the only absolute test of the soundness of canned corn, without opening the cans, is the swelling and bursting of the cans. There were no swelled cans, and there was no evidence of fraud in the transaction. On a suit by the vendor on a note given by the vendee, the court below held "a sale by sample is not a warranty" of quality, and a verdict and judgment were entered for the plaintiff. On appeal, the judgment was affirmed, Sharswood, J., dissenting. Agnew, C. J., in pronouncing the opinion of the court, said: "If we trace the law of this state through the following cases, we shall find that a sale of chattels by the production of a sample, but without fraud,

[1] 83 Pa. St., 319.

or circumstances to fix the character of the sample as a standard of quality, is not attended by any implied warranty of the quality. The sample, under such circumstances, pure and simple, becomes a guaranty only that the articles to be delivered shall follow its kind, and be simply merchantable. These are the cases referred to.[1] . . . Such, precisely, was the state of this case. The broker, going on a business round, produced a can of the corn, and exhibited it to the defendants, and they afterwards asked to see others, which they opened and examined and proved by looking for themselves. On the following day they made an offer for the lot, which was accepted. There was no fraud and no warranty to show that the parties dealt upon the basis of a quality to be precisely such as the cans exhibited contained. The evidence also showed that such cans are hermetically sealed to preserve the corn, and are thus bought and sold, and that the only true indication of their being spoiled is the bulging of the cans produced by fermentation . . . which swell out the head. It is also shown that these cans were

[1] Borrekins *v.* Bevan, 3 Rawle (Pa.), 23; Jennings *v.* Gratz, 3 ib., 168; Kirk *v.* Nice, 2 Watts (Pa.), 367; McFarland *v.* Newman, 9 ib., 55; Fraley *v.* Bispham, *supra;* Carson *v.* Baillie, 19 Pa. St., 375; Wetherill *v.* Neilson, 20 Pa. St. 448; Eagen *v.* Gall, 34 Pa. St., 236; Weimer *v.* Clement, 37 Pa. St., 147; Whitaker *v.* Eastwick, 75 Pa. St., 229.

not bulged. The court charged, if there were fraud in the selection of the cans as a means of imposition, or they were of a particular lot, and the seller delivered from a different lot, it would be evidence of fraud. But the court saw no evidence in the case of either fraud or warranty, and under these circumstances charged that a sale by sample was not in itself a warranty of the quality of the corn. This language is too broad for all cases, but under these facts it seems to us there was no error in the instruction. It was said of a general sale, without circumstances. The seller did not agree or say that the remainder should be of the same quality as the sample, and the purchaser did not order the corn to be delivered to be of the same quality as the sample; nothing was said or done on either side to give character to the sample cans as a standard of the quality. This being the nature of the sale, the sample became a standard only of the kind, and the goods were simply merchantable. So long as the commodity is salable, its different degrees of quality from good to bad are not the subject of an implied warranty; if it be wholly unmarketable, such as cannot be considered merchantable, probably a different conclusion would be reached, because an unmarketable article is substantially different in kind from one that is salable in the market."

§ 210. With respect to these decisions, in Pennsylvania, on the subject of the warranty implied in a sale by sample, it may be remarked that they have always been regarded with great doubt by the Philadelphia Bar; and that in Boyd *v.* Wilson the learned Justice Sharswood, the late Chief Justice of Pennsylvania, dissented, while Justice Williams was absent on the argument of the case.

### III. *Usually no Implied Warranty of Merchantability in a Sale by Sample.*

§ 211. Generally there is no implied warranty of merchantability in a sale by sample on the ground of *expressum facit cessare tacitum.*[1]

### IV. *Semble, that the Sample shown by a manufacturer is presumed to be free from secret defects.*

§ 212. It has been strongly intimated that the sample shown by the manufacturer or producer must be taken as free from secret defects.[2]

### V. *Production of Sample not necessarily Sale by Sample.*

§ 213. While a sale by sample generally constitutes a warranty that the bulk of the article sold is equal to the sample, the mere production of the sam-

[1] See *supra*, §§ 159–166, 184; and *infra*, § 262.

[2] *Supra*, §§ 146, 184–185.

ple is not always a sale by sample; for the parties may not care to rely upon the sample as the standard of the quality of the article sold, or they may prefer to contract with reference to some express contract. Thus, in Salisbury *v.* Stainer[1] it was proved on the trial that defendants wrote plaintiffs a letter to the effect that "advices received from Trieste this morning by the English packet, quote first quality Ferrara hemp, *same as sold to you;*" that the hemp had been generally represented as of the first quality; that plaintiff examined the hemp in person, by cutting open one bale, being also told by defendants to *examine well for himself*, and that he might so have examined all the hemp. It was contended this was a sale by sample, from which it should be inferred the bulk was equal to the sample. Bronson, J., said: "This was not a sale by sample; Salisbury was told to examine and did examine the hemp for himself. He inspected the bales, cut open one of them, and was at liberty to open others, had he chosen to do so. If he was not satisfied of the quality and condition of the goods, he should either have proceeded to a further examination or provided against a possible loss by requiring a warranty."

§ 214. In Barnard *v.* Kellogg,[2] Barnard, residing

[1] 19 Wend. (N. Y.), 159. [2] 10 Wallace, 383.

in Boston, placed a lot of wool, received from a shipper in Buenos Ayres, in the hands of certain wool brokers to sell, with *instructions not to sell unless the purchaser came to Boston to examine the wool for himself.* The brokers sent to Kellogg & Co., at Hartford, Connecticut, samples of the lots of wool, and Kellogg wrote in reply, naming a price, and offering to take the wool, if equal to sample. The brokers accepted this offer, provided the dealers in Hartford examined the wool, and stated whether they would take it or not. Kellogg acceded to this condition, and examined four bales in the brokers' office, and was offered an opportunity to examine the whole, but this he declined to do. Afterwards, it was discovered that the cotton was deceitfully packed with rags and damaged wool, of which, however, Barnard was ignorant. On the trial of the case, without a jury, the court held this not to be a sale by sample; but found that there was a custom of merchants in Boston and New York, where such goods are sold, by virtu eof which, a warranty is implied that the same are not deceitfully packed, which custom the court held valid, and binding on the parties to the sale. On appeal, the Supreme Court of the United States held, that this was not a sale by sample, as the sale was evidently on inspection; that by the common law there is no implied warranty

against secret defects, where the seller is neither the manufacturer nor producer; and that the custom in question was unreasonable and invalid. Strong and Bradley, JJ., dissented. Davis, J., said: "It is apparent that the usage in question was inconsistent with the contract which the parties chose to make for themselves, and contrary to the wise rule of law governing the sales of personal property. It introduced a new element into their contract, and added to it a warranty, which the law did not raise, nor the parties intend it to contain. The parties negotiated on the basis of *caveat emptor*, and contracted accordingly."

§ 215. In Ames *v.* Jones,[1] D. purchased from producers in the vicinity of Napanee a lot of barley, and in so doing always selected the best, and rejected the inferior barley. Subsequently he shipped the barley to Oswego, and the defendant's agent visited the warehouse of D. and was shown a sample of barley, which he took to New York and showed to defendant, who then telegraphed to D., "will give one-twenty for your thirty thousand choice Napanee barley afloat in N. Y.;" and D. in turn replied, "will accept your offer of one-twenty —can give you ten thousand more if you wish." This was the entire negotiation. D. was appa-

[1] 77 N. Y., 614.

rently ignorant of the delivery of the sample to defendant. In an action for the price, defendants contended this was a sale by sample, and the barley was inferior to the sample. Held, not a sale by sample.

§ 216. In Beirne *v.* Dord,[1] blankets in bales were sold by the defendant to the plaintiff in the former's shop. When the purchase was made, defendant exhibited to the purchaser several pairs of blankets, which were examined by him and were found to be sound. Nothing was said as to the rest, which it was possible, though not convenient, to have examined. On delivery the blankets were found moth-eaten. Plaintiffs offered to prove the existence of a custom to the effect, that sales were usually made in this manner, and that it was not customary to examine the bales at the sale, but if any blankets turned out to be bad, they were either taken back, or an allowance was made for them to the purchaser, which evidence was allowed, on exception. The court charged the jury "the evidence was not admitted for the purpose of proving a general usage of trade, forming a part of the contract, or of itself establishing a sale by sample; but it was received as an item of testimony tending to show, in connection with other

[1] 1 Selden (N. Y.), 95.

evidence, that a personal examination of the bulk sold was never contemplated by either party, and that both parties intended to contract upon the sample only, and to make the testimony effective even to this extent, you must be satisfied that there was a general usage in this trade, not merely to sell by exhibiting a sample specimen, but to sell with a mutual understanding that the bulk should be like the sample in all respects." The court, on appeal, held this charge to be error, on the ground that the custom could not be admissible to control the general rules of law on the subject. In speaking of the dealing by sample in a sale, Jewett, J., explained the distinction between a sale by sample, and a sale where a sample is exhibited. "The mere circumstance," said he, "that the seller exhibits a sample at the time of the sale, will not of itself make it a sale by sample, so as to subject the seller to liability on an implied warranty as to the nature and quality of the goods; because it may be exhibited, not as a warranty that the bulk corresponds to it, but merely to enable the purchaser to form a judgment on its kind and quality. If the contract be connected by the circumstances attending the sale, with the sample, and refer to it and it be exhibited as the inducement to the contract, it may be a sale by sample; and then the consequence follows, that the seller warrants the

bulk of the goods to correspond with the specimen exhibited as a sample. Whether a sale be a sale by sample or not, is a question of fact to find from the evidence in each case; and to authorize a jury to find such a contract, the evidence must satisfactorily show that the parties contracted solely in reference to the sample exhibited. That they mutually understood that they were dealing with the sample as an agreement or understanding that the bulk of the commodity corresponded with it; or, in other words, the evidence must be such as to authorize the jury, under all the circumstances of the case, to find that the sale was *intended* by the parties as a sale by sample. . . . That a personal examination of the bulk of the goods by the purchaser at the time of the sale is not practicable nor convenient furnishes no sufficient ground of itself to say that the sale is by sample. The want of an opportunity, from whatever cause, for such an examination, is doubtless a strong fact in reference to the question of the character of the sale, whether it is made by sample or not—but it is nevertheless true, that a contract of sale by sample may be made whether such examination be practicable or not, *if the parties so agree.* Where the acts and declarations of the parties in making the contract for the sale of goods are of doubtful construction,

evidence that it was impracticable or inconvenient to examine the bulk of the goods would be proper, and in connection with evidence of other circumstances attending the transaction might aid in coming to a correct conclusion in respect to the true character of the contract."

§ 217. In Powell *v.* Horton[1] a sample of the goods was exhibited, but the written contract contained a warranty that the goods should be "Scott & Co.'s mess pork," the court held the sale not to be by sample, but with an express warranty.

§ 218. In Carter *v.* Crick[2] the seller exhibited, at the sale, a sample of an article denominated "seed barley," being ignorant what it really was; and sold it by the sample: held, the risk as to the kind of article was on the buyer, provided the article delivered corresponded with the sample.[3]

[1] 2 Bing. N. C., 668. [2] 4 H. & N., 412.

[3] See, also, Gardiner *v.* Gray, 4 Campb. 144; Tye *v.* Fynmore, 3 Campb. 462; Russell *v.* Nicolopulo, 8 C. B. N. S. 362; Megaw *v.* Molloy, L. R. 2 Ir. 530; Josling *v.* Kingsford, 13 C. B. N. S. 447; Towerson *v.* Aspatria, etc., 27 L. T. N. S. 276; Schnitzer *v.* Oriental Print Works, 114 Mass. 123; Whitmore *v.* South Boston Iron Co., 2 Allen (Mass.), 52; Day *v.* Raguet, 14 Minn. 273; Waring *v.* Mason, 18 Wend. (N. Y.) 425; Jones *v.* Wasson, 8 Bax. (Tenn.) 211; Atwater *v.* Clancy, 107 Mass. 369; Ames *v.* Jones, 77 N. Y. 614.

## SECTION V. THE WARRANTY IMPLIED FROM A USAGE OR CUSTOM.

§ 219. A warranty is often implied from some familiar usage of the trade prevalent at the place where the parties deal; such usage, however, must be shown to be in all respects reasonable, and have otherwise the necessary qualifications of a valid usage, to be binding upon the parties. The following cases are illustrations of usages that have been held valid:—

§ 220. In Clark *v.* Baker[1] it was held that evidence of a usage was admissible to prove that, in the port of Boston, where a cargo of corn is sold in bulk, lying in the vessel in which it is imported, and the sale is made under a warranty, the purchaser shall receive it and retain so much as may correspond with the warranty, and reject the residue, which thereupon revests in the seller. Dewey, J., remarked: "The extent to which local usages of trade are to be applied, in the construction and effect to be given to contracts, is a matter by no means free from difficulty. These usages differ essentially from those more general customs which are known and exist as part of the general law of the land, and which are observed and applied without being offered in each particular case. *These*

[1] 11 Metc. (Mass.), 186.

*local usages may be of comparatively recent origin, and may be limited to a single city or village; and yet, if reasonable in their provisions, and so generally adopted by those concerned in any peculiar branch of business, as to authorize the presumption that they are known by those who are dealing as vendors and vendees in that branch of trade or business, the dealings and contracts of such persons are considered to have been made with reference to such usages, and to be governed thereby.* Learned jurists have often expressed their regret at the extension of this species of evidence, and especially that as to usage, of a local and limited character, as impairing, in some degree, the symmetry of the law, and tending to uncertainty and embarrassment in the administration of justice, and also liable to the serious objection, that the knowledge, by the party affected by it, of the existence of such usage, is a mere legal presumption which may often be unfounded in reality, although such usage is established by what is deemed competent legal evidence. Notwithstanding these objections, such local usages have been admissible by the judicial tribunals, as competent to explain and qualify the contract, and give to it an effect materially different from that which the general law would have done, in the absence of all evidence of such usage."

§ 221. In Snowden *v.* Warder[1] the court admitted evidence of a usage at Philadelphia, that, on the purchase and sale of cotton, the vendor shall answer the vendee for any latent defect in the article sold, though there be no fraud, and in the absence of any warranty.

§ 222. In Boorman *et al. v.* Jenkins[2] it was held that, evidence of a usage was admissible, to show that, in a certain locality, a sale of packed cotton is a sale by sample, though the written evidence of the sale was silent in that respect; the parol evidence of the usage being admissible to explain, though not to contradict, the written instrument.

§ 223. In Fatman *v.* Thompson[3] evidence was offered to show an established usage among Cincinnati tobacco dealers to warrant, in all sales of a particular kind of tobacco, the article as sound and merchantable for four months after the sale, and on proof of its being to the contrary, the seller to make a reduction in the price. Held, a reasonable usage. Storer, J., said: "Whenever a usage of any particular trade or place is established to exist, the law, as we understand it, implies on the part of him 'who contracts or employs another to contract for him, upon a matter to which such

[1] 3 Rawle (Pa.), 101.
[2] 12 Wend. (N. Y.), 566.
[3] 2 Disney (Cinn.), 482.

usage or custom has reference, a promise for the benefit of the other party, in conformity with such usage; provided there be no express stipulation between them which is inconsistent with such usage.' . . . Its reasonableness must depend in a great measure upon the place where the contract is made, as well as upon the nature of the commodity sold. When once established, it becomes the rule of the trade, and the dealer in the article sold cannot protect himself by asserting his ignorance of the usage."

In the following cases, the usages of the place or trade were held not reasonable, and therefore illegal:—

In Barnard *v.* Kellogg,[1] the facts of which case are fully stated above,[2] the court held that, as the goods were bought on inspection, consequently the rule of *caveat emptor* applied; and that evidence of such usage, as was offered in this case, was not admissible, as it was inconsistent with the general law of the land, and besides, as the parties were not aware of it, they could not have been supposed to have contracted with reference to it.

In Dodd *v.* Farlaw[3] the court held a usage, that gives a broker an implied authority to warrant

[1] 10 Wallace, 383.

[2] See *supra*, § 214.

[3] 11 Allen (Mass.), 426.

goods sold by him to be of a merchantable quality, is inadmissible. Bigelow, C. J., remarked: "It is liable to the grave objection that it is unreasonable, and so contrary to the ordinary rules by which the relation of principal and agent is regulated, that it cannot be presumed to have been in contemplation of a vendor in employing a broker to make a sale of merchandise. Even if the usage was known to the vendor, he would have a right to disregard it, and to disavow a contract made in conformity to it."

In Wetherill *v.* Neilson[1] an offer was made to prove the existence of a custom of the trade at the port of Philadelphia, that soda ash is sold upon the representation of the seller as to the percentage of alkali contained in it, without warranty or sample. Held, inadmissible. Lowry, J., said: "As to the offer to prove a special custom in Philadelphia as to the special article of soda, if it means anything at all, it means that, when people in Philadelphia are selling soda, common English words of representation become words of warranty. It must be conceded that such evidence has been admitted (Snowden *v.* Warder[2]), but never without serious doubts, and we have found ourselves unable to follow the example. See Coxe *v.* Heisley."[3]

[1] 20 Pa. St., 448.
[2] 3 Rawle (Pa.), 101.
[3] 19 Pa. St., 243.

This case, it must be admitted, virtually overrules that of Snowden *v.* Warder, *supra*, in which an able opinion was delivered by Ross, J.[1]

In Jones *v.* Bowden,[2] where in auction sales of certain drugs, as *pimento*, it was usual to state in the catalogue whether they were damaged by the sea or not, and if not so stated, they were assumed not to be, it was held that, the omission in the catalogue to state the goods were damaged, was an implied warranty that they were not injured by the sea.

## Section VI. The Implied Warranty of Title.

### I. *Sale of Goods, Choses in Action, etc., generally.*

§ 224. With respect to *executory* contracts of purchase and sale, where the subject is unascertained, but is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to the subject-matter should be transferred in the same manner as it would be implied,

[1] See, also, the Monte Allegre, 9 Wheat. 616; Andrews *v.* Kneeland, 6 Cowen (N. Y.), 354; Pearson *v.* Stoddard, 9 Gray (Mass.), 199; Atwater *v.* Clancy, 107 Mass. 369; Snelling *v.* Hall, 102 Mass. 134; Marshall *v.* Perry, 67 Me. 78; Packard *v.* Earle, 113 Mass. 280; Randall *v.* Smith, 63 Me. 105.

[2] 4 Taunt., 847.

under similar circumstances, that a merchantable article was to be supplied. Unless goods, which the party could enjoy as his own, and make full use of were delivered, the contract would not be performed. The purchaser could not be bound to accept, if he discovered the defect of title before delivery, and if he did, and the goods were recovered from him, he would not be bound to pay, or having paid, he would be entitled to recover back the price, as on a consideration which had failed.[1] But when there is a bargain and sale of a *specific ascertained chattel*, which operates to transmit the property, and nothing is said about title, what is the legal effect of that contract? Does the contract necessarily import, unless the contrary be expressed, that the vendor has a good title? Or has it merely the effect of transferring such title as the vendor has? and this is the only question to consider; for if the vendor knew that he had no title, and concealed the fact, he was always held responsible to the purchaser as for a fraud, in the same way that he is if he knew of the defective quality of the goods; but this is another principle.

§ 225. "It is very remarkable," observed Baron

[1] Per Parke, B., in Morley *v.* Attenborough, 3 Exch. p. 509; Brown *v.* Cockburn, 37 U. C. Q. B. 592; see, also, *supra*, § 89.

Parke, in the opening part of his opinion, in Morley *v.* Attenborough, "that there should be any doubt" as to this (the implied warranty of title in a bargain and sale), for it "certainly is a question so likely to be of common occurrence, especially in this commercial country. Such a point, one would have thought, would not have admitted of any doubt. The bargain and sale of a specified chattel, by our law (which differs in that respect from the civil law), undoubtedly transfers all the property the vendor has, where nothing further remains to be done, according to the intent of the parties. But it is made a question, whether there is annexed by law to such a contract, which operates as a conveyance of the property, an implied agreement on the part of the vendor, that he has the ability to convey. . . . According to the Roman law (*vide* Domat, Book I., tit. 2, s. 2, art. 3), and in France (Code Civil, chap. 4, sect. I., art. 1603), and Scotland, and partially in America (1 Johns. Rep. 274, Broom's Maxims, 628, where this subject is well discussed), there is always an implied contract that the vendor has the right to dispose of the subject which he sells (Bell on Sales, 94); but the result of the older authorities is *that there is by the law of England no warranty of title in the actual contract of sale any*

*more than there is of quality.* The rule of *caveat emptor* applies to *both.*"

§ 226. It may be, as Baron Parke, in this case suggested, that, as in earlier times, the chief transactions of purchase and sale were in markets and fairs, where the *bona fide* purchaser, without notice, obtained a good title, as against all, except the crown (and afterwards a prosecutor, to whom restitution is ordered by the 21 Hen. VIII., c. 11), the common law did not annex a warranty to any contract of sale. Be that as it may, the older authorities are strong to show that there is no such warranty implied by law from the mere sale; and Mr. Benjamin confirms this with the remark, that "it should also be remembered, when inferences are drawn from very ancient decisions, that there formerly existed statutory provisions which have grown obsolete. The laws passed in the times of Ethelbert and Edgar specially prohibited the sale of anything above the value of 20*d.*, unless in open market, and directed every bargain and sale to be made in the presence of credible witnesses."[1]

§ 227. The two cases that have been, in later years, in England and the United States, most

[1] Benjamin on Sales (third English, and fourth Amer. ed. Corbin), at page 838; Wilkins's Leg. Anglo-Sax.; 4 p. Ethel. 10, 12; Eadg., 80,

generally quoted upon this point, are Morley *v.* Attenborough[1] [1849], and Eichholz *v.* Bannister[2] [1864].

§ 228. Morley *v.* Attenborough[3] was the sale of an unredeemed pledge by a pawnbroker, and it was held there was no implied warranty of title. The principle upon which this was decided was that "the pawnbroker, when he sells an unredeemed pledge, virtually says: I have, under the provisions of the statute, a right to sell. If you choose to buy the article, it is at your own peril."[4]

§ 229. The decision in this case, then, does not controvert nor establish the broad principle that, by the mere act of selling a chattel, the vendor impliedly warrants his title to the thing sold; but only decides that a pawnbroker, as an auctioneer, judicial officer, or pledgee, etc., obviously intending merely to sell the pledger's or original owner's title or interest, does not impliedly affirm what that may be; and this principle would be true, even if a warranty were implied in the sale of a specific chattel. It is true that certain *dicta* fell from the learned Baron Parke, to the effect that such a warranty is not implied in a bargain and sale; but these were not necessary to the decision, or involved in the principle decided.

[1] 3 Exch., 500. [2] 17 C. B. N. S., 708. [3] Exch., 500.

[4] Per Earle, C. J., in Eichholz *v.* Bannister, 17 C. B. N. S. 722.

§ 230. In Eichholz *v.* Bannister[1] [1864], the plaintiff purchased, *at the defendant's warehouse*, certain goods, "a job just received by him." An invoice was made out, and the goods were delivered and paid for. Subsequently, it turned out that they had been stolen, and the vendee was compelled to return the goods to the true owner. In the action on the money counts, it was held that the vendor, by his conduct, had affirmed that he was the owner of the article sold, and the buyer might recover back, and on the money counts, what he had paid. Erle,[1] C. J., quoted the remarks of Parke, B., in Morley *v.* Attenborough,[2] at page 513: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shopkeeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case, the vendor sells '*as his own*;' and that is what is equivalent to a warranty of title," and said, referring to these remarks, "that learned judge puts the case, upon which I ground my judgment." He subsequently added . . . in almost all the transactions of sale in common life, the seller by the very act of selling, holds out to the buyer that

[1] 17 C. B. N. S., 708, 722. [2] *Supra.*

he is the owner of the article he offers for sale. The sale of the chattel is the strongest act of dominion that is incidental to ownership. A purchaser, under ordinary circumstances, would naturally be led to the conclusion that, by offering an article for sale, the seller affirms that he has title to sell. . . . I think justice and sound sense require us to limit the doctrine, so often repeated, that there is no implied warranty of title on the sale of a chattel. I cannot but take notice that, after all the research of two very learned counsel,[1] the only semblance of authority for this doctrine, from the time of Noy and Lord Coke, consists of mere *dicta*."

§ 231. Strictly speaking, this decision only affirms one of the exceptions to the general supposed rule used as an illustration by Baron Parke, in Morley *v.* Attenborough, and holds that, under ordinary circumstances, a shopkeeper, by selling goods at his shop, impliedly warrants the title to them; the broad question, whether by the mere fact of the sale of chattels, the vendor impliedly warrants the title to them, still remaining unsettled. The above *dictum*, however, of Erle, C. J., may be considered as entitled to very great weight.

[1] C. Pollock and Holker.

*a. In England, the rule as stated by Mr. Benjamin, Q. C.*

§ 232. Mr. Benjamin, after an elaborate review of the English authorities, in his very able book on Sales, at page 839, puts the existing rule in England thus: "On the whole, it is submitted that, since the decision in Eichholz *v.* Bannister, the rule is substantially altered. The exceptions have become the rule, and the old rule has dwindled into the exception, by reason, as Lord Campbell said, of 'having been wellnigh eaten away.' The rule at present would seem to be stated more in accord with the recent decisions if put in terms like the following: *A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title, unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattels sold.*"[1]

§ 233. I have not been able to find any later English case that has decided the point,[2] and, though the question may not be judicially settled, the rule in England, in view of the remarks

[1] Benjamin on Sales, 4th Amer. ed., by Corbin.

[2] See Bagueley *v.* Hawley, L. R. 2 C. P. 625; Page *v.* Cowasjee Edulgee, L. R. 1 P. C. 127. See *infra*, § 234.

of the court in Eichholz *v.* Bannister, is in all probability as stated by Mr. Benjamin.

*b. In Canada, the Rule as stated by Mr. Benjamin, approved in Brown* v. *Cockburn,*[1] *after a review of the English cases.*

§ 234. In Canada, in Brown *v.* Cockburn[1] [1876], the plaintiff agreed to sell to the defendants certain timber, which he was about to cut at a certain date. The logs were cut and delivered, but the government made a claim upon them for timber dues, for which they would be liable if the plaintiff had not obtained his patent before cutting the trees. The court held, *inter alia*, that though there was no express warranty, yet, as this was an executory contract of sale, the vendor was bound to give a good title. In this case, Harrison, C. J., reviewed at considerable length the English authorities. He said: "It is contended by the plaintiff that as at the time of the sale there was no express warranty of title none is to be implied, and that the rule of *caveat emptor* applies. The *law of England* as to when a warranty of title will or will not be implied in a sale of goods *is not entirely free from doubt.* The rule of the civil law as given by Pothier, is as follows: "The vendor's

[1] 37 U C. Q. B., 592.

obligation is not at an end when he has delivered the thing sold. He remains responsible after the sale to warrant and defend the buyer against eviction from that possession. This obligation is called a warranty: Pothier, Vente, part 2, ch. 1, sect. 2, No. 82. By the civil law every man is bound to warrant the thing he selleth or conveyeth, albeit there be no express warranty, but the law bindeth him not unless there be a warranty, either in deed or in law, for *caveat emptor*, etc.: Co. Litt., 102 a. See, also, Noy's Maxims, 42. Blackstone says the law is different as to goods, if the vendor 'sells them as his own:' 2 Black. 451. The first decision in England of which we have any record is, according to Mr. Benjamin, in his learned work on Sales of Personal Property, 2d edition, p. 516, L'Apostre *v.* L'Plaistrier, mentioned in 1 P. Wms., 318, as a decision on a different point, but when it was cited as an authority in Ryall *v.* Rowles,[1] Lee, C. J., sitting with Lord Chancellor Hardwicke, said, 'My account of that case is different from that in Peere Williams. . . . It was held by the court that offering to sell generally was sufficient evidence of offering to *sell as owner*, but no judgment was given, it being adjudged for further argument.' In Dickenson *v.* Naul,[2] where an auc-

[1] 1 Ves., 348. [2] 4 B. & Ad., 638.

tioneer employed by a supposed executrix sold goods of the testator, but before payment the real executor claimed the money from the buyer, it was held that the defendant was not liable to pay the auctioneer for the goods. In Allen *v.* Hopkins[1] a somewhat similar case, Dickenson *v.* Naul, was approved; Pollock, C. B., saying, at page 102, 'It appears to us that the defendant was placed in no such difficulty; that he had a right simply to say as he has done; that the plaintiff had no authority to sell the goods in question, as the property in them was in another, and that he had discovered that person and paid him the value of the goods. It was put in the argument on the ground of *caveat emptor*. I certainly can find no authority, and I have no recollection of ever hearing that doctrine applied to this case, that the buyer is bound to take care that the plaintiff has a good title to the goods; and that if it turn out that the plaintiff has not a good title, the buyer of the goods should have taken care of that before he made the contract, and therefore is bound by the contract, notwithstanding he is able to prove that the seller had no title. The doctrine of *caveat emptor* applies not at all, as I apprehend, to the title of the plaintiff, but to the condition of the goods. But in Morley

[1] 13 M. & W., 94.

*v.* Attenborough,[1] which was the case of a pawnbroker selling an unredeemed pledge, the court held, with certain exceptions, that the rule *caveat emptor* applies, that there is no implied warranty of title in the contract of sale of a personal chattel, and that in the absence of fraud a vendor is not liable for a defect of title, unless there be an express warranty or *an equivalent to it by declaration or conduct.* In Chapman *v.* Speller,[2] which was an action for goods sold at a sheriff's sale, it was held that there was nothing equivalent to a warranty by declaration or conduct; the defendant having bought simply the interest of the execution debtor. Patteson, J., however, in delivering judgment, said, at p. 624, 'In deciding for the defendant under these circumstances, we wish to guard against being supposed to doubt the right to recover back money paid upon *an ordinary purchase* of a chattel, where the purchaser does not have that for which he paid.' In Sims *et al. v.* Marryat,[3] an action in respect of the sale of a copyright, the conduct of the vendor was held to be equivalent to an express warranty of title; Lord Campbell saying, at p. 290, 'I do not think it necessary to inquire what the law would be in the absence of an express warranty. . . . The decision in Morley

[1] 3 Exch., 500. [2] 14 Q. B., 621. [3] 17 Q. B., 281.

*v.* Attenborough was that a pawnbroker, selling an unredeemed pledge as such, did not warrant the title of the pawner. Of that decision I approve; but a great many questions, beyond the mere decision, arise on the very able judgment of the learned Baron in that case, which I fear must remain open to controversy. It may be that the learned Baron is correct in saying that, on the sale of personal property, the maxim of *caveat emptor* does by the law of England apply; but if so, *there are many exceptions stated in the judgment which wellnigh eat up the rule.*' The rule as laid down in Morley *v.* Attenborough[1] was followed in Hall *v.* Conder *et al.*, which was the sale of an alleged patent right. But in Eichholz *v.* Bannister,[2] which was an action in respect of goods sold in an open shop, Erle, C. J., said, at p. 725, 'I think justice and sound sense require us to limit the doctrine, so often repeated, that there is no implied warranty on the sale of a chattel: . . . the only semblance of authority for this doctrine . . . consists of mere *dicta*. . . . These dicta, it is true, appear to have been adopted by several learned judges, amongst others by my excellent brother Williams, whose words are almost obligatory on me; but I cannot find a single instance in which it has been more than a repetition

[1] 2 C. B. N. S., 22. [2] 17 C. B. N. S., 708.

of barren sounds, never resulting in the fruit of judgment. . . . It is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed.' In Eichholz *v.* Bannister it was held that by selling in an open shop the defendant had so conducted himself as to bring himself within one of the recognized exceptions to Morley *v.* Attenborough. . . . In Bagueley *et al. v.* Hawley,[1] which was an action in respect of the sale of a boiler set in brickwork, it was held (Willes, J., *dissentiente*), that there was no conduct amounting to a warranty of title. The case does not appear to have been carried any further. Mr. Benjamin, in his very able work on Sales, 2d ed., p. 522, has stated the result of the authorities. . . . If it were necessary for the decision of this case to accept the result as stated by Mr. Benjamin, I should, after a careful perusal of the authorities, have little difficulty in doing so, and in doing so would hold that the plaintiff in this case by selling the logs as his, impliedly warranted that they were his, and that there were no facts or circumstances showing a contrary intention. But in Morley *v.* Attenborough, and running through all the cases following,

[1] L. R., 2 C. P. 625.

we find one exception within which this case may be brought without doing violence to any of the decided cases. Lord Wensleydale, in giving judgment, at p. 509, says: 'With respect to executory contracts of purchase and sale, where the subject is unascertained and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred in the same manner as it would be implied under similar circumstances that a merchantable article was to be supplied. Unless a good article, the party could enjoy as his own and make full use of, were delivered, the contract would not be performed. The purchaser could not be bound to accept if he discovered the defect of the title before delivery, and if he did and the goods were recovered from him, he would not be bound to pay, or having paid he would be entitled to recover back the price as on a consideration which had failed.' This case fairly and fully comes under the operation of the exception. We are glad of it, for we confess we have much less difficulty in finding the exception than in finding the rule."

§ 235. In Canada, then, the object of our inquiry does not seem to be settled by a decision, but the law appears to be in the same condition as that of England; though the *dictum* of the court may be entitled to great weight as authority.

*c. In the United States the rule, as stated by Sharswood, C. J., in Bank* v. *Kurtz.*

§ 236. In the United States there are many *dicta*, but few decided cases on the point.

§ 237. In Ricks, Administrator, *v.* Dilahunty,[1] the principle was thus laid down; Collier, C. J., saying: "It is understood that *the seller of personal chattels impliedly stipulates that the article sold is his own, and that he will indemnify the buyer for the loss, if the title is in another person;*[2] and Selden, J., in Hoe *v.* Sanborn,[3] said: "It is obvious that the vendor of goods would be very likely to know whether he has a title to the goods he sells; he knows the source from which such title was obtained, and has, therefore, means of judging of its validity, which the purchaser cannot be supposed to have. Hence it is the doctrine, both of the civil and the common law, that *every vendor impliedly warrants that he has title to what he assumes to sell.* Some slight doubt has been supposed to be thrown

[1] 8 Porter (Ala.), 137.

[2] 3 Black. Com., 166; Stuart *v.* Wilkins, Doug. 18; Furnis *v.* Leicester, Cro. Jac. 474; Crosse *v.* Gardiner, Carth. 90; Mockbee's Adm. *v.* Gardner, 2 H. & G. (Md.) 176; Chism *v.* Woods, Hardin (Ky.) 531; Osgood *v.* Lewis, 2 H. & G. (Md.) 495; Defreeze *v.* Trumper, 1 John. (N. Y.) 274.

[3] 21 N. Y., 555.

upon this doctrine, in England, by the remarks of Parke, B., in the case of Morley *v.* Attenborough.[1] It is, however, too well settled, both in England and in this country, to be overthrown or shaken by the *obiter dicta* of a single judge. My object is not to establish this doctrine, which admits of no doubt, but simply to show that it rests upon the foundation here suggested, viz., the presumed superior knowledge of the vendor in regard to his title. The case of Morley *v.* Attenborough itself tends, in my view, to confirm this position. It arose upon a sale, by a pawnbroker, of a harp pledged with him as security for a debt. The sale was made through auctioneers, and a general catalogue was furnished to the bidders, which 'stated on the title page that the goods for sale consisted of a collection of forfeited property.' The court held that there was no implied warranty of title in that case. There was, perhaps, good reason why this case should be considered an exception to the general rule; the pawnbroker could not justly be presumed to have any special knowledge in regard to the ownership of the articles pledged. The probability was that he had received them upon the faith of the pledgor's possession alone, and the purchaser was, in this respect, upon an equal foot-

[1] 3 Exch., 500.

ing with himself." The same doctrine was again enunciated by the court in McKnight *v.* Devlin[1] (1873). Allen, J, said: "The notes were given for personal property, and in the absence of an *express warranty of title the law would imply a warranty. Every vendor of chattels is supposed to know his title, and to warrant it, if he sells without disclosing any defects that may exist in it.* . . . In this case, however, there was an express warranty of title by the seller, the payee of the notes."

§ 238. In People's Bank *v.* Kurtz,[2] it was held that the vendor of a certificate of stock in his possession warrants his own title thereto, and that it is a genuine certificate issued by the duly constituted officers of the company, and sealed with the genuine seal of the corporation; though he does not warrant that such certificate does not constitute part of a fraudulent over-issue of stock, or the solvency of the company.

Sharswood, C. J., said: "It was held at first that in an action on the case for deceit against a party who had sold a personal chattel to the plaintiff, to which he had no title, it was necessary to aver a *scienter* (Dale's Case;[3] Roswel *v.* Vaughan[4]); but this doctrine was subsequently exploded, and an averment of possession considered sufficient, as

[1] 52 N. Y., 401.
[2] 11 W. N. C. (Phila.), 225.
[3] Cro. Eliz., 44.
[4] Cro. Jac., 196.

the vendor must be intended cognizant of his own title, the sale being necessarily an affirmation of title: Crosse *v.* Gardner,[1] Medina *v.* Stoughton.[2] It may now be regarded as well settled, that a party *selling as his own personal property of which he is in possession, warrants the title to the thing sold; and that if by reason of a defect of title nothing passes, the purchaser may recover back his money, though there be no fraud or warranty on the part of the vendor.*"

§ 239. The rule,[3] as laid down, by Sharswood, C. J., seems to be generally in accordance with the decisions and expressions of opinion of the indi-

[1] Carthew, 90. [2] 1 Ld. Raym., 593.

[3] See, also, Williamson *v.* Sammons, 34 Ala. 691; Chism *v.* Woods, Hardin (Ky.) 531; Chancellor *v.* Wiggins; 4 B. Mon. Ky.) 201; Grose *v.* Hennessey, 13 Allen (Mass.), 390; Dorr *v.* Fisher, 1 Cush. (Mass.) 273; Fogg *v.* Willcutt, id. 300; Bennett *v.* Bartlett, 6 id. 225; Marshall *v.* Duke, 51 Ind. 62; Long *v.* Anderson, 62 id. 537; Morris *v.* Thompson, 85 Ill. 16; Gookin *v.* Graham, 5 Humph. (Tenn.) 480; Colcock *v.* Goode, 3 McC. (S. C.) 513; Hale *v.* Smith, 6 Greenl. (Me.) 420; Butler *v.* Tufts, 13 Me. 302; Whitaker *v.* Eastwick, 75 Penn. St. 229; Dresser *v.* Ainsworth, 9 Barb. (N. Y.) 619; Vibbard *v.* Johnson, 19 John. (N. Y.) 77; Heermance *v.* Vernoy, 6 id. 5; Sweet *v.* Colgate, 20 id. 196; Johnston *v.* Barker, 20 Upper Canada C. P. 228; Mercer *v.* Cosman, 2 Hannay (N. B.) 240; Porter *v.* Bright, 82 Penn. St. 443; McCoy *v.* Artcher, 3 Barb. (N. Y.) 323; Gaylor *v.* Copes, 16 Fed. Rep. 49.

vidual judges in the United States, and it is sustained by the annotator to Story on Sales,[1] and by Kent.[2]

§ 240. The doctrine that the vendor *of chattels in possession* impliedly warrants the title extends to choses in action;[3] as in the sale of other things, he undertakes not for their quality, that they are really worth the money they represent, but that they are what they purport to be. In other words, he warrants the genuineness of the claim upon them.[4]

§ 241. It would seem, therefore, in the United States, as we are led to conclude from the *dicta* of the judges, and the few decided cases on the point, that the courts are not inclined to favor the rule, or at all events, have not decided that the *mere fact of the sale implies a warranty of title in all cases*, but restrict its application to cases where the vendor is *in possession* of the goods he sells.

§ 242. In speaking of this in Byrnside *v.* Burdett,[5] Haymond, J., quoted, approvingly, the remarks of Mr. Benjamin, and said: "In the second Ameri-

[1] § 367 (last edition). [2] 2 Kent, 478 (12th ed.).

[3] Ritchie *v.* Summers, 3 Yeates (Pa.), 531; Charnley *v.* Dulles, 8 W. & S. (Pa.) 361; Swanzey *v.* Parker, 50 Pa. St. 450.

[4] Lyons *v.* Divelbis, 22 Pa. St. 185; Flynn *v.* Allen, 57 Pa. St. 482. See, also, Baker *v.* Arnot, 67 N. Y. 448; Wood *v.* Sheldon, 42 N. J. L. 421; People's Bank *v.* Kurtz, 11 W. N. C. (Phila.) 225.

[5] 15 West Va., 702.

can edition of Benjamin on Sales, it is said at § 641, pp. 594, 595, that in America the distinction between goods *in possession of* the vendor, and those *not in possession*, so decisively repudiated by Buller, J., in Pasley *v.* Freeman,[1] and by the judges in Eichholz *v.* Bannister,[2] and in Morley *v.* Attenborough,[3] seems to be fully upheld; and the rule there is, that as to goods in possession of the vendor there is an implied warranty of title, but when the goods sold are in possession of a third party at the time of the sale, there is no such warranty, and the vendor buys at his peril. And in the note of the learned editor of the last edition of Story on Sales (3d ed., p. 459), it is said that "this distinction has now become so deeply rooted in the decisions of the courts, in the *dicta* of judges, and in the conclusions of the learned authors and commentators, that even if it were shown to be misconceived in its origin, it could not at this day be easily eradicated. And Kent sustains this view of the law: 2 Kent, p. 478." He added: "A warranty of the title is to be implied from the contract as much in the case of an exchange of articles then *in the possession of those making the trade*, as upon a sale."

§ 243. In Word *v.* Cavin,[4] McKinney, J., said:

[1] 3 T. R., 58.
[2] 3 Exch., 500.
[3] 17 C. B. N. S., 708.
[4] 1 Head (Tenn.), 506.

"As regards the sale of *personal* property, the settled rule is, that if one sells goods or chattels as owner, *being clothed with visible ownership or possession at the time of the sale*, he impliedly undertakes and promises, though nothing be stipulated or said upon the subject, that the goods or chattels are his property, and that he has a lawful right to make the sale and transfer he proposes to make; and if he were not the owner at the time of the sale, and the property was in a third person, who subsequently claims and deprives the purchaser of it, the seller will be responsible in damages for the breach of such implied undertaking: Addison on Con., 248–55. This principle does not apply when *the seller is not in possession of the property* at the time of the sale, nor where the person does not sell as *owner* of the property, but in some special character or capacity, and this is known to the purchaser. In such case the purchaser is bound to look to his vendor."

§ 244. In Somers *v.* O'Donohue,[1] Draper, C. J., said: "Notwithstanding the case of Morley *v.* Attenborough, and particularly after the case of Sims *v.* Marryat, I should have great hesitation in holding that where a man having *a chattel in his possession* sells and delivers it to another for value,

[1] 9 U. C. C. P., 210.

there is not from the very nature of the transaction an implied undertaking that he has a right to sell. Possession is a clear *indicium* of property, and a purchaser ought, in the absence of any circumstances to create a doubt, to be able to rely on it without further inquiry, for it is within the vendor's knowledge when and how he came by the possession, and in acquiring it, he may fairly be assumed to have relied on the responsibility of his immediate vendor. The authorities, especially the older cases, were all brought in review by the counsel in arguing Morley *v.* Attenborough, and it is unnecessary to refer to them again *seriatim.* The strong inclination of my own opinion is, to hold that where a man sells a *chattel as his own, which is at the time of sale in his actual possession,* and delivers it to the purchaser from whom it is taken by the rightful owner, the vendor is to be treated as impliedly warranting that he has a right to sell, and is therefore bound to compensate his vendee for the loss."

§ 245. In Shattuck *v.* Green,[1] Morton, J., said it was a "general rule of law in this country, that in a sale of chattels a warranty of title is implied, unless the circumstances are such as to give rise to a contrary presumption: 1 Smith's Lead. Cas.,

[1] 104 Mass., 45.

6th Am. ed., 242; 1 Parsons on Contracts, 5th ed., 576. If the vendor has either *actual or constructive possession*, and sells the chattels and not merely his interest in them, such sale is equivalent to an affirmation of title and a warranty is implied."

And in Whitney *v.* Heywood,[1] Dewey, J., said: "*Possession here must be taken in its broadest sense*," and "the excepted cases must be substantially cases of sales of the mere *naked interest* of *persons having no possession, actual or constructive, and in such cases no warranty of title is implied.*" The possession of an agent or of a tenant in common, holding the goods for the vendor and as his property, and not adversely, is the constructive possession of the vendor; and if he sells property thus held as his, a warranty of title is implied.[2]

[1] 6 Cush. (Mass.), 82.

[2] Hubbard *v.* Bliss, 12 Allen (Mass.), 590; Cushing *v.* Breed, 14 id. 376. See, also, Storm *v.* Smith, 43 Miss. 497; Whitney *v.* Heywood, 6 Cush. (Mass.) 82; Lines *v.* Smith, 4 Fla. 47; Emerson *v.* Brigham, 10 Mass. 202; Coolidge *v.* Brigham, 1 Metc. (Mass.) 551; Inge *v.* Bond, 3 Hawks (N. C.), 101; Thurston *v.* Spratt, 52 Me. 202; McCabe *v.* Morehead, 1 W. & S. (Pa.) 513; McCoy *v.* Artcher, 3 Barb. (N. Y.) 323; Dresser *v.* Ainsworth, 9 id. 619; Long *v.* Hickingbottom, 28 Miss. 772; Huntingdon *v.* Hall, 36 Me. 501; Moser *v.* Hoch, 3 Penn. St. 230; Boyd *v.* Bopst, 2 Dall. (Pa.) 91; Gross *v.* Kierski, 41 Cal. 114; Matheney *v.* Mason, 73 Mo. 677; Story on Sales, § 367; 2 Kent, 478 (12th ed.).

§ 246. But this distinction, in respect to the effect of the affirmation between the case of when the vendor is in possession and when not, does not seem to be recognized in England; for Mr. Justice Buller, in Pasley *v.* Freeman,[1] disclaimed any such distinction, treating it as equivalent to a warranty in both cases, and this was quoted by Parke, B., in Morley *v.* Attenborough.[2]

§ 247. Indeed, it is difficult to understand the force of this distinction, and it is doubtful if it is possessed of any virtue. Few sales can be imagined in which the vendor has not either the actual or constructive possession of the thing he professes to sell; and if, as was stated by Dewey, J., in Whitney *v.* Heywood,[3] "possession here must be taken in its broadest sense, and the excepted cases must be substantially cases of sales of the *mere naked interest* of persons having *no possession, actual or constructive*," the law in America would differ little from that as established in England, in Eicholz *v.* Bannister,[4] as is well pointed out by Mr. Corbin in his valuable notes to the fourth American edition of Benjamin on Sales [1883], at page 841.

[1] 3 T. R., 58.

[2] 3 Exch., 510; Benjamin on Sales, 4th Amer. ed., Corbin, 840.

[3] 6 Cush. (Mass.), 82, 86. [4] 17 C. B. N. S., 708.

## II. *Sale of Patents.*

§ 248. The question has more than once arisen as to whether, in the assignment of letters patent for an invention, or a right under such letters patent, there is an implied stipulation, by the vendor, of the validity of the monopoly which the letters patent profess to grant; and, in order to intelligently consider the point, it will be necessary to ascertain upon what ground the implied stipulation of validity is based. Is the validity of the monopoly in the nature of an implied condition precedent, of existence, in the sale of the thing; on the principle that the sale being of a monopoly, there can be no valid contract, and consequently no sale, unless the subject-matter of the sale, *i. e.*, a valid monopoly exist? Or can the vendee treat the contract as a sale by description, and demand a merchantable article; that is, letters patent, salable as such? Or, is the validity of the monopoly merely a *quality* of the thing assigned? Or, finally, should the stipulation be regarded as an implied warranty of *title;* that is, a warranty of the validity of the monoply sold? To determine the principle on which the implied stipulation can be grounded, it should be perfectly clear what the nature of the assignment is; what the parties mean by such a contract, and what is intended to pass. If we regard the contract of sale of letters patent as a

contract for the sale of a specific, defined thing, the thing being the *vendor's* title or right in a certain monopoly, to which he may or may not have an *indefeasible* title, and not the sale of the *monopoly itself*, it would seem to be more logical to consider the implied stipulation of validity, as a *warranty* of quality, rather than a *condition;* or, perhaps better, to treat it as a *warranty of title to the monopoly sold.* Considering the contract to be, then, as assumed, the implied warranty of validity or title may be considered, first, "where the seller" assigns or sells his "right, title, and interest" in the monopoly; secondly, where the letters patent themselves are assigned; and, thirdly, where a party obtains a license to use the patented process, exclusive or otherwise.

§ 249. *a.* Where the vendor assigns merely "all his right, title, and interest" in the monopoly, it would seem, on general principles, whether there is ordinarily implied a warranty of validity in the sale of letters patent or not, that by the use of the above words, the vendor meant to limit the operation of the conveyance, to his interest in the monopoly, whatever that might be, and in no way to guarantee his title to the thing he professes to sell.[1]

[1] See *infra*, IV.; see Krumbhaar *v.* Birch, 83 Pa. St. 428; Perry *v.* Corning, 7 Blatch. 195; Shattuck *v.* Green, 104 Mass. 45; but see Faulks *v.* Kamp, 3 Fed. Rep. 898.

§ 250. *b.* Where the letters patent themselves are assigned, it would seem, when the nature of the contract is considered, that it would be unreasonable to suppose that a vendor ordinarily should intend to insure, or the vendee expect to get, an indefeasible title and right to the monopoly sold, when neither party could necessarily possibly know whether the vendor's title was valid or not, and when the vendee possessed precisely the same opportunity of ascertaining its validity as the vendor. There is undoubtedly, however, some conflict of opinion upon the subject.

§ 251. The point arose in Hall *v.* Conder.[1] There the vendor reciting that he had *invented*, and had *obtained a patent*, for a certain invention, a moiety of which he had already disposed of, and that he had another half to dispose of, sold the "above mentioned one-half of the English patent." In an action for the price on the agreement, defendant pleaded, *inter alia*, that the vendor was not the *first inventor* of the patented process, and that the patent was *worthless*, and *not new*. Held, the plea was bad. Williams, J., said: "But did the plaintiff profess to sell, and the defendant to buy, a good and indefeasible patent right? or, was the contract merely to place the defendant in the same situation as the plaintiff was in reference to the alleged

[1] 2 C. B. N. S., 22.

patent? . . . The plaintiff professed to have *invented* a method for the prevention of boiler explosions. It is not alleged that he was guilty of any fraud. He must, therefore, have been an inventor; for, if he was not, he must have known it, and would have been guilty of fraud in pretending to have invented. Whether he was the true and first inventor within the meaning of the Statute of James, is another question. The material allegations in the plea are that the alleged invention was wholly worthless, . . . that it was not new . . . and that the plaintiff was not the first and true inventor. . . . They (the defendants) had the same means of inquiring into the fact, and of learning whether it had been in use, or the invention had been previously made known in England. Why, therefore, should we assume that the plaintiff meant to assert that the patent was indefeasible, and that the defendants purchased in that understanding rather than that, each knowing what the invention was, and having equal means of ascertaining its value, they contracted for the patent such as it was, each acting on his own judgment? The case is not "within the principle upon which the case of Chanter *v.* Leese[1] was decided; for, there the plaintiff contracted that the defendants should have the *exclu-*

[1] See *infra*, § 255.

*sive right* to sell certain things for which patents had been obtained, . . . and, to use the language of Lord Abinger, the whole resting in contract and nothing having been done under it, the contract was at an end. Here the plaintiff was capable of fulfilling all that he contracted for." In the Exchequer Chamber Lord Campbell said: "The thing contracted for here was a *real patent under the Great Seal*, although, by reason of circumstances not within the knowledge of either party at the time of the contract, it might ultimately prove valueless." And Erle, J., observed that "many a patent for an old and worthless invention, so to speak, has been upheld by the aid of a skilful advocate."[1]

§ 252. In the United States, so far as I have been able to consult the cases, the judges appear generally to have *assumed* the existence of an implied warranty of validity in the sale.[2] In Geiger

[1] See, also, to the same effect, Smith *v.* Neale [1857], 2 C. B. N. S. 67.

[2] Bellas *v.* Hays, 5. S. & R. (Pa.) 427; Angier *v.* Eaton, etc., Co., 98 Pa. St. 594; McDowel *v.* Meredith, 4 Whart. (Pa.) 314, Earl *v.* Page, 6 N. H. 480; Van Ostrand *v.* Reed, 1 Wend. (N. Y.) 424; Jolliffe *v.* Collins, 21 Mo. 338; McClure *v.* Jeffrey, 8 Ind. 83; Holden *v.* Curtis, 2 N. H. 63; approved in Wilder *v.* Adams, 2 Wood. & Minot (U. S.) 331; Green *v.* Stuart, 7 Bax. (Tenn.) 420–421; Nash *v.* Lull, 3 Amer. Rep. 435; Faulks *v.* Kamp, 17

*v.* Cook,[1] Justice Sergeant put the stipulation on the ground of a condition of existence, and at page 270 said: "As to the . . . failure of consideration, that seems to go on the ground that it would be against equity to compel payment for a patent right when it turns out that no patent right existed. Chancery would relieve against such demand on the ground of material error or misconception going to the essence of the contract, although there was no fraud in the vendor. As, where one sells a messuage to another which was at the time swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party. There a court of equity would relieve the purchasers upon the principle that both parties intended the purchase and sale of a subsisting thing, and implied its existence as the basis of their contract." In Nash *v.* Lull,[2] Gray, J., observed: "In a suit on a promissory note, the only consideration for which is the assignment of an interest in or right under a patent, *the question of consideration depends upon the validity of the patent; if the patent is void, the note is of course without con-*

O. G. 851; Darst *v.* Brockway, 11 Ohio, 462, 471; Dickinson *v.* Hall, 14 Pick. (Mass.) 217; Marston *v.* Swett, 66 N. Y. 206; Marston *v.* Swett, 82 N. Y. 526; Kinsman *v.* Parkhurst, 18 How. (U. S.) 289. But see Perry *v* Corning, 7 Blatch. 205.

[1] 3 W. & S. (Pa.), 270. [2] 3 Amer. Rep., 435, 437.

*sideration;* but if it is valid, the court will not inquire into the adequacy of the consideration. The issue in such a case is, therefore, the same as in the suit in the courts of the United States for the infringement of a patent, the validity of which is denied by the defendant." And in Holden *v.* Curtis,[1] Woodbury, J., said: "But the sale of patents, though required to be recorded, is the sale of mere personal property; and hence, on a *failure of title to the patent, the money received for it by the vendor cannot be retained* unless some equitable circumstance, or some technical rule, interpose to make the case an exception to the general principle."

§ 253. The decisions referred to, it is true, have been decided by the State courts; but in Faulks *v.* Kamp[2] [1880] the point was lately passed upon by Wheeler, J., in the Circuit Court of the United States for the Southern District of New York. There Faulks, having purchased from the defendants a patent right, sold an interest therein to each of the other orators in the bill. The defendants subsequently acquired prior letters patent, which were alleged to cover the same improvements, etc., and in a bill against infringement, denied the validity of the letters patent assigned by them to Faulks.

[1] 2 N. H. [1819], 61, 63. [2] 17 O. G., 851.

It was doubtful whether the letters patent were valid or not; but the court held (1st) that by the sale the defendants had impliedly warranted the validity thereof, and (2dly) that in any event they were estopped from subsequently setting up its invalidity. Wheeler, J., said: "Every seller of personal property impliedly warrants that he has title to and right to sell what he assumes to sell. His undertaking to sell includes an undertaking to that effect. . . . The nature of the right covered by letters patent does not seem to be such that a warranty of the right cannot be implied. . . . Whoever assumes to sell a patent, assumes that he has it to sell. . . . The defendants in possession and enjoyment of that exclusive right assume to sell and transfer it. After that, in justice, they ought not to be heard to say they had it not and did not sell it."[2]

It would seem that the real principle involved in this case is rather that of estoppel than warranty, and the learned judge quoted Chambers *v.* Crichley,[1] which went on the vendor's estoppel in a like case; but the language of the judge seems to imply that he grounded his opinion on both principles. It has

[1] 33 Beavan, 374; see, also, Kinsman *v.* Parkhurst, 18 How. (U. S.), 289.

[2] See, also, Wilder *v.* Adams, 2 Wood. & Minot (U. S.), at p. 331. But see the rule laid down in Perry *v.* Corning, 7 Blatch. 205.

been said that the existence of the implied stipulation of validity has been *assumed* by the judges generally in the United States; for it is difficult to find any case in which the nature of the sale of letters patent, or what was intended to pass by the sale, has been discussed at any length, but the courts have generally considered as an established fact, that the sale of letters patent is a sale of a monopoly, and not the vendor's right or title, whatever that may be, to the monopoly.

§ 254. In Canada, in Gray *v.* Billington[1] [1871], Hall *v.* Conder[2] was approved.

§ 255, *c.* Where the "exclusive right to manufacture, sell, etc.," or in short, where a license under a patent is assigned, a somewhat different principle is involved; for in this case the vendor does not sell the specific, ascertained thing, the letters patent, but contracts to grant an *exclusive right* to the assignee, which, if the former be unable to transfer, he cannot demand the price, or the consideration upon which the contract was made; and consequently in an executory contract the assignee or licensee can rescind. The question was discussed in Chanter *v.* Leese,[3] where the vendor, reciting that he had obtained, with others, certain patent inventions, contracted in writing with the defendants that it

[1] 21 U. C. C. P., 288. [2] 2 C. B. N. S., 22.
[3] 4 M. & W., 295; 5 M. & W., 698.

should be lawful for the latter "to use, manufacture, and sell any or all of the said patent inventions, within certain limits . . . on certain terms." In an action on this agreement, defendants pleaded that the invention was not a novelty, etc. Held, *inter alia*, the plea was good. Lord Abinger, C. B., said:[1] "The declaration is founded upon the contract and nothing but the contract: if a man contract to pay a sum of money in consideration that another has contracted to do certain things on his part, and it should turn out, *before anything is done under it*, that the latter was incapable of doing what he engaged to do, the contract is at an end. . . . But in the present case it does not appear to the court that the defendants ever accepted or enjoyed any part of the patents which were the consideration of their agreeing to pay. . . . The plea, therefore, impeaching the consideration, is a good plea. . . ." Tindal, C. J.,[2] said: "There is no assignment of the patents by deed in this case; no *interest* in them passed to the defendants, but the whole matter rests *in contract*."[3] So in Harlow *v.* Putnam[4] it was held that an exclusive license to manufacture under letters patent, for a specified

[1] 4 M. & W., 295, 311. [2] 5 M. & W., 698, 700.

[3] See, also, remarks of Williams, J., upon this case, in Hall *v.* Conder, *supra*, § 251.

[4] 124 Mass., 553.

time, containing an agreement to convey to the licensee at the end of that time, at his election, is without consideration if the letters patent are void. It must be admitted, however, in the United States generally, that the point is put upon the general principle that in the assignment of letters patent there is a failure of consideration if the letters patent be not valid, and not especially upon the construction of the contract.[1]

§ 256. The principle of Chanter *v.* Leese[2] and the cases referred to, applies only, however, to executory contracts of sale, for it has frequently been decided that if the licensee has used or enjoyed the license for the term specified; or, where the contract is indivisible, has enjoyed it at all; it is immaterial whether the monopoly itself is valid or not, for he has got all he bargained for;[3] just as a lessee who has occupied the leased premises cannot refuse to pay the rent therefor, whether the landlord's title be valid or not.

[1] See, generally, Jackson *v.* Allen, 120 Mass. 64; Dickinson *v.* Hall, 14 Pick. (Mass.) 217; Lester *v.* Palmer, 4 Allen (Mass.), 145; Nash *v.* Lull, 102 Mass. 60; Angier *v.* Eaton, etc., Co., 98 Pa. St. 594; Darst *v.* Brockway, 11 Ohio, 471; Kinsman *v.* Parkhurst, 18 How (U. S.), 289; Marston *v.* Swett, 82 N. Y. 526.

[2] *Supra.*

[3] See Kinsman *v.* Parkhurst, 18 How (U. S.), 289; Lawes *v.* Purser, 6 E. & B. 929, approved in Gray *v.* Billington, 21 U. C. C. P. 288; Marston *v.* Swett, 66 N. Y. 206; Angier *v.* Eaton, etc., Co., 98 Pa. St. 594.

§ 257. We may conclude, then:

1. That, in the sale of the vendor's "right, title, and interest" in a monopoly, there is probably no implied warranty as to the validity of the monopoly sold, but the vendee is merely placed in the vendor's position.

2. That in the assignment of letters patent it would *seem* from the nature of the contract that no warranty of the validity of the letters patent can be asserted, and this is the law of England; though the point is not definitively settled in the United States. The leaning of the courts, as shown by their dicta, however, being in favor of the existence of an implied warranty of title or validity.

3. That in a conveyance of the "exclusive right to manufacture, etc.," under letters patent, the question becomes an interpretation of the particular contract, and in such a case, in an executory contract, the vendee can rescind, and refuse payment; though, in an executed contract, or in a contract indivisible and partly executed, it is otherwise.

### III. *Exchange.*

§ 258. It is obvious that where one exchanges goods with another he impliedly warrants his title, as in the case of a sale. "There can be no doubt,"

said Christiancy, J., in Hunt *v.* Sackett,[1] "that a warranty of title, on the part of the defendant, was implied in the contract of exchange as it would have been upon a sale." See, also, Patee *v.* Pelton,[2] Byrnside *v.* Burdett,[3] Sargent *v.* Currier.[4]

### IV. *Sale of an Interest in a Chattel.*

#### *a. Rule generally.*

§ 259. An apparent exception to the general rule is had in the case of a sale of an interest in an article, instead of the article itself. But if analyzed this will be seen in reality not to be an exception; as the sale of an interest, or a sale of all one's right, title, and interest in a thing, obviously means to substitute the vendor's interest in the thing for the thing itself, and thereby excludes all idea of a warranty of title to the chattel sold, beyond the vendor's interest, which may be nothing.

§ 260. This principle is exemplified by the case of Bank *v.* Mass. Loan and Trust Co.[5] There A., by a written contract, pledged to B. some tobacco, reciting that it was "free from all incumbrance." B. borrowed money of C. and delivered the tobacco

[1] 31 Mich., 18.
[2] 48 Vt., 183.
[3] 15 W. Va., 717.
[4] 49 N. H., 310.
[5] 123 Mass., 330; see, also, Shattuck *v.* Green, 104 Mass. 42; Krumbhaar *v.* Birch, 83 Pa. St. 428.

to him, giving at the same time an assignment to him of all his "right, title, and interest" in the article. Held, there was no implied warranty of title by B. to C.[1]

*b. Sale by Judicial Officers, etc.*

§ 261. Another apparent exception to the rule is a sale by a judicial officer, auctioneer, etc. This will again be seen to be but an apparent exception, as obviously before the sale the purchaser is aware the goods are not the officer's, and that he sells them, without any peculiar knowledge of his own, as to the title in them. Besides, it may be said, this is analogous to the other exception just noticed, since he sells the mere interest of the prior owner to the purchaser, rather than the title to the goods themselves, without affirming what it is.

§ 262. Thus Selden, J., in Hoe *v.* Sanborn,[2] said: "There are exceptions to the general rule. . . . The case of judicial sales is one. There is no ground for presuming that the officer of the law has any peculiar knowledge on the subject of the title to the property he exposes to sale. No doubt both the pawnbroker and the officer, if shown to have knowledge which they conceal, would be liable for fraud; or, if they could justly be presumed

[1] See Morley *v.* Attenborough, *supra.* [2] 21 N. Y., 556.

to have such knowledge, would be liable upon an implied warranty. It was expressly held in the case of Peto *v.* Blades,[1] that the law raises an implied promise on the part of a sheriff who sells goods taken in execution, that he does not know that he is destitute of title to the goods." So in Weidler *v.* Farmers' Bank[2], Gibson, J., said: "The contract between the judgment-creditor and the purchaser at a sheriff's sale is not like that which arises when, from the subject-matter and nature of the agreement, it must be conceded that the parties proceed on a supposition that the facts are in a particular way, and in which the common mistake of both is good ground to rescind the bargain; but the purchase is essentially based on a state of things resting on contingency. The parties do not treat for a title, but the creditor proposes to sell and the purchaser to buy, just whatever interest the debtor may have in the land, for nothing more is affected by the judgment; and therefore mere mistake without misrepresentation of circumstances or any other species of express fraud by the creditor, will be insufficient to enable the purchaser to recover back the price he has paid; he purchased the debtor's title such as it is, and must stand to the risk. But for actual fraud

[1] 5 Taunt., 657. [2] 11 S. & R. (Pa.), 138.

the judgment-creditor would be liable; and an innocent man who had been inveigled by him into a purchase, might rescind the contract and compel him to refund."[1]

## Section VII. Enumeration of some Warranties that have been held not to be Implied in Sales of Chattels.

§ 263. It may be convenient to enumerate some of the warranties which, it has been asserted, are implied in the sales of chattels, but which the courts have declined to recognize.

### I. *Expressio Unius est Exclusio Alterius.*

§ 264. An express warranty, as a general rule, excludes any idea of an implied warranty, on the principle of *expressio unius est exclusio alterius.* Thus in Lanier *v.* Auld's Adm'r,[2] where the writing in evidence showed that defendant had made an express warranty as to the age and soundness of a negro slave, in a sale to the plaintiff, the court held that this fact excluded any idea of an implied

[1] See, also, Cross *v.* Gardner, Carth. 90; Morley *v.* Attenborough, 3 Exch. 500; Smith *v.* Painter, 5 S. & R. (Pa.) 223; Freeman *v.* Caldwell, 10 Watts (Pa.), 9; Vandever *v.* Baker, 13 Pa. St. 121; The Monte Allegre, 9 Wheat. 616; Neal *v.* Gillaspie, 56 Ind. 451; Hicks *v.* Skinner, 71 N. C. 539.

[2] 1 Murphy (N. C.), 138.

warranty: "We are of opinion that the law will not imply what is not expressed, where there is a formal contract: Evans's Essays, 321; Forbes, 364; Doug., 654; 6 Term Rep., 606. The express warranty as to soundness and age excludes any implied warranty as to other qualities." So in Deming *v.* Foster,[1] where there was a sale of oxen, warranted sound and all right, and which both parties knew were intended for farm work, the court held, *inter alia*, there was no implied warranty of fitness for farm work. Bell, C. J., said: "Where there is an express warranty of the quality of an article sold, in any respect, no further warranty will be implied by the law. Thus, if a man sell a horse and warrant it sound, and the seller knows that it is intended to carry a lady, and the horse is sound, but is not fit to carry a lady, there is no breach of warranty. With respect to any other warranty beyond that expressed, the maxim is, *expressum facit cessare tacitum:* Maule, J., in Dickson *v.* Zizinia;[2] Parkinson *v.* Lee;[3] Budd *v.* Fairmaner."[4] In Wells *v.* Spear,[5] however, it was

[1] 42 N. H., 165. [2] 70 E. C. L. R., 602. [3] 2 East, 314.

[4] 8 Bing., 52; see, also, Wood *v.* Ashe, 1 Strobh. (S. C.), 407; Duff *v.* Ivy, 3 Stew. (Ala.) 140; Stucky *v.* Clyburn, Cheves (S. C.) 186.

[5] 1 McC. (S. C.), 421; see, also, Hughes *v.* Banks, 1 ib. 537; Mody *v.* Gregson, L. R. 4 Exch. 49; Merriam *v.* Field, 24 Wisc. 640; Wilcox *v.* Owens, 64 Ga. 601.

said that, though the above was the general rule, yet there were certain exceptions to it; and the court held that an express warranty of title did not exclude an implied warranty of soundness.

§ 265. But a man may make an express warranty where one would be implied, if nothing had been said: Gill *v.* Kaufman.[1]

### II. *Warranty not implied against Necessary Depreciation during Transit.*

§ 266. Usually a warranty is not implied against the necessary depreciation during transit.

§ 267. In Leggat *v.* Sands, etc.,[2] it was held that if ale, shipped from Chicago to Montana, was found to be of the quality ordered, there was no warranty that it would bear transportation during a journey of sixty days; and the court refused to admit evidence of a custom to the effect that sellers of ale credit the purchasers with what is unfit for use, the circumstances not warranting its legality or reasonableness.

### III. *No Warranty against Improper Packages.*

§ 268. There is no implied warranty that the packages in which goods are contained are what

[1] 16 Kan. 571; see, also, *supra*, §§ 159–166; 184, 211.

[2] 60 Ill., 158; see, also, Beer *v.* Walker, 46 L. J. C. P. 677; Bigge *v.* Parkinson, 7 H. & N. 955; Bigger *v.* Bovard, 20 Kan. 204.

they should be; though possibly if the goods are injured by bad packing, and so delivered, there would be a defence to an action for the price, on the ground that the goods were not merchantable.[1]

### IV. *Third Parties.*

§ 269. With respect to the extension of the warranty to third parties, see Moser *v.* Hoch,[2] and Longmeid *v.* Holiday.[3]

### V. *Fair Price does not imply Sound Article.*

§ 270. A warranty that an article is sound is not implied from the fact that a sound or fair price is paid;[4] in South Carolina, however, the rule is the other way.[5]

[1] See Gower *v.* Van Dedalzen, 3 Bing. N. C. 717.

[2] 3 Pa. St., 230. [3] 6 Exch., 761.

[4] Weimer *v.* Clement, 37 Pa. St. 147.

[5] Barnardiston *v.* Yates, 1 N. & Mc (N. C.), 142; see, also, Bulkley *v.* Honold, 19 Howard (U. S.), 390.

# CHAPTER V.

## REMEDIES OF THE PARTIES; MEASURE OF DAMAGE.

SECTION I. REMEDIES OF THE PARTIES.

I. *Where there is neither a theoretical nor physical, actual, delivery of the article sold.*

*A. Affirmance or Avoidance of the Contract*, § 272.

II. *Where there is a theoretical or physical, actual, delivery of the article sold.*

*A. Affirmance of the Contract.*

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*b. Sale or Return of Goods*, § 306.

*c. Goods Returned; Breach of Warranty*, § 311.

Right of inspection in a sale by sample, § 312.

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*B. Avoidance of the Contract.*

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## SECTION I. REMEDIES OF THE PARTIES.

§ 271. OF the remedies of the parties, those of the buyer it will be only necessary to consider, as under the buyer's remedies will obviously fall all the principles applicable to the remedies of the parties, that involve questions of law peculiar to the warranties of chattels in sales.

### I. *Where there is neither a Theoretical nor Physical, Actual, Delivery of the Article sold.*

#### *A. Affirmance or Avoidance of the Contract.*

§ 272. It has already been stated that the contract of warranty is an independent, self-existent contract, collateral to the principal contract of sale, and that a sale is perfectly good without the presence of any contract of warranty; it is therefore obvious that if the terms of the principal contract have not been complied with unconditionally, as by a delivery of the article sold, the terms of

the collateral contract cannot in the least affect the question, and, therefore, so long as the buyer has not received possession of the article sold, whether the contract of sale remain executory, or the property to the article sold has passed to him, the only remedies he would have against the seller are those he would have on the contract of sale alone; that is, an action for breach of contract, or the right to rescind the contract, before the property has passed, and an action of trover, or in certain cases a bill in equity for the specific performance of the contract of sale, after the property in the article has passed.

§ 273. This may be illustrated by Osborn *v.* Gantz,[1] where the plaintiffs contracted to deliver fifteen casks of "pure cream of tartar as per sample . . . payable by *gold note at ninety days.*" The goods were delivered by the plaintiffs, but the defendants refused to give their note for the amount, claiming that the goods did not correspond with the sample, and also retained possession of the goods, "for a faithful performance of the contract." In an action by the plaintiffs to recover possession, it was held that the delivery of the goods was conditional on the payment of the note, and that the refusal of the defendants to per-

[1] 60 N. Y. 540.

form their part gave the plaintiffs a right to the possession of the goods; and that the question of warranty could not arise in the case, as the original contract of sale had never been executed. Allen, J., remarked: "The refusal of the defendants to perform the condition gave the plaintiffs the right to retain their goods, the property in which had always remained in them. There was good reason for the possession of the goods by the defendants before the consummation of the sale. They had a right to test the accuracy of the weight by the plaintiffs, and an opportunity to compare the bulk with the sample, before they could be called upon to pay for the goods. . . . Until the completion of the sale, they held them as trustees for the plaintiffs. . . . If the plaintiffs had been willing to deliver the goods absolutely, in performance of the contract, the defendants have refused to receive them, and have rejected them as not conforming to the sample. . . . If the goods did not agree with the sample, they should have rejected them, and taken their remedy for non-performance of the contract.[1] . . . What the rights or remedies of the defendants would have been by reason of the alleged impurity and defects of the article sold, and its inferiority to the sam-

[1] Couston *v.* Chapman, L. R. 2 Sc. Ap. 250.

ple, had the defendants completed the purchase and became the owners, need not be considered. A warranty is an incident only of consummated or completed sales, and has no place as a contract, having present vitality and force, in an executory agreement of sale. *The only question was whether the delivery was absolute or conditional.*" For the remedies for the breach of a contract of sale, the reader is referred to some work on contracts or sales.[1]

### II. *Where there is a Theoretical or Physical, Actual, Delivery of the Article sold.*

#### *A. Affirmance of the Contract.*

*a. Goods Retained.*

§ 274. Where the seller is guilty of a breach of warranty in the sale of an ascertained, specific chattel, or of a chattel unascertained at the time of the contract, but subsequently ascertained and appropriated, and the title passes, the buyer may, in the absence of any fraud, proceed against the seller, either by an action on the case, or in *assumpsit*, for the breach of contract.[2]

§ 275. The old method of declaring for a breach

[1] Wharton on Contracts, or Benjamin on Sales, 4th Amer. ed., Corbin.

[2] Schuchardt *v.* Allens, 1 Wall. (U. S.) 359, 368; Vanleer *v.* Earle, 26 Pa. St. 277; Freyman *v.* Knecht, 78 Pa. St. 141;

of warranty was altogether in *tort*, and the gist of the action was the fraud or deceit of the vendor.[1]

§ 276. In an action on the *warranty*, with an averment of *warranty* in the declaration, the deceit of the seller was implied from the breach of the warranty, and it appears that it was not necessary to aver a *scienter*, or, if averred, to prove it where the *warranty* itself, and the breach thereof, were set up.

§ 277. As, for instance, in Denison *v.* Ralphsen,[2] in which the second count stated a *warranty* that the goods were good and merchantable, and averred that the defendant had delivered them bad and unmerchantable, *knowing them to be naught*, the court observed the knowledge need not be proved in evidence. So in Chandelor *v.* Lopus,[3] the court remarked that the action would not lie, as there was no averment of *warranty*, and the question of the *sciens* was immaterial in the pleadings.

Doughlass, etc., Co. *v.* Gardner, 10 Cush. (Mass.) 88; Youghiogeny Iron Co. *v.* Smith, 66 Pa. St. 340; Vail *v.* Strong, 10 Vt. 457; Bennett *v.* Tregent, 24 U. C. C. P. 565.

[1] Chandelor *v.* Lopus, Cro. Jac. 4; Sprigwell *v.* Allen, Aleyn, 91; Williamson *v.* Allison, 2 East, 446; Schuchardt *v.* Allens, 1 Wall. (U. S.) 359, 368.

[2] 1 Ventr., 366; see, also, Williamson *v.* Allison, 2 East, at page 448.

[3] Cro. Jac., 4.

§ 278. In declaring on the *deceit directly*, however, and not on the *warranty*, it was necessary to aver the *scienter*.

§ 279. Thus, in a certain case at Guildhall[1] [6 Geo. II.], Lord Raymond is reported to have said that "the *scienter* was only necessary to be proved where the action was in the nature of an action of deceit *without any warranty*;" and Sprigwell *v.* Allen,[2] and Chandelor *v.* Lopus,[3] are to the same effect.

§ 280. In Stuart *v.* Wilkins [1778], it was first judicially determined that assumpsit, as well as case, would lie for breach of warranty. The practice was first judicially settled in this case, but many pleaders had, for twenty years before that, drawn their declarations, for breach of warranty, in assumpsit; and in that case, though Lord Mansfield said the declaration, as being in assumpsit, had struck him, yet he remarked that that had been the practice for several years back.[4]

§ 281. It is very important to note this, as by reason of the change from declaring in *tort* to *assumpsit;* the words necessary to aver the war-

[1] Per Lawrence, J., referring to ——— *v.* Purchase, in Williamson *v.* Allison, 2 East. 448.

[2] Williamson *v.* Allison, *supra.* [3] Douglass, 20.

[4] See the remarks of Ashhurst and Buller, JJ., in that case. See, also, remarks of Lord Ellenborough in Williamson *v.* Allison, *supra.*

ranty in the pleadings, have been also modified, and this probably came about in the following way:—

§ 282. The old form of action on a warranty, being an action in tort, and the ground of the action being the deceit of the vendor, it was generally necessary to lay in the declaration either an express *deceit* with a *scienter*, or a *warranty*, in which deceit was implied, without any *scienter*.

§ 283. In Crosse *v.* Gardiner[1] [1 W. & M.], however, where the plaintiff *falso et malitiose affirmabat* that oxen, which the defendant had in his possession and sold to the plaintiff, were his, when in truth they belonged to another person, and there was a verdict for the plaintiff, it was moved in arrest of judgment that the declaration was ill, because the plaintiff had not laid a *sciens* in his declaration, nor had he alleged any deceit or *warranty;* the court was clear, upon consideration, "that the action would lie upon a *bare affirmation ut supra;* and that this case differed from the books cited, because here the plaintiff had no means to know to whom the property of these oxen did belong, but only by the possession," and the authorities in the note were cited.[2] This case, therefore, decided—

[1] Carthew, 90.

[2] Yelverton, 20, 40; 2 Cro. Jac., 474; 2 Cro., 196, 387, 469, 470; 1 Roll. Abr., 91; Sid., 146; 1 Lev., 102.

1. That an affirmation at the time of a sale is proof of a warranty, provided it appear in evidence to have been so intended.

2. That in an action on the case for breach of warranty of title, it is not necessary to aver a *warranty* in the declaration, but an *affirmation* is sufficient; because, the seller and buyer stand on unequal ground, the buyer only being able to know in whom is the property of the chattel sold by possession, which is a color of title, and perhaps no other title can be made, and the seller seemingly would always be aware of his title to his own chattels; that is, that in such a case, a *bare affirmation* is a sufficient averment of a *warranty* in the pleadings, the deceit being sufficiently implied *aliunde;* and that this differs from other cases of breach of warranty in *tort.*

3. That it is likewise unnecessary in such a case to lay *deceit* or a *sciens.*[1]

§ 284. It subsequently became common to bring the action for breach of warranty in assumpsit, for the convenience of inserting the counts for money had and received; it being readily perceived that though a breach of warranty may be a tort, yet a warranty also includes a promise, which may be declared on, as well as the tort, there being no law

[1] See Medina *v.* Stoughton, Salk. 210.

preventing a party from taking one remedy because there is another. This principle was first judicially recognized, as has been stated in Stuart *v.* Wilkins,[1] though practised by the bar some time previously.

§ 285. Now, applying certain principles of law decided in Crosse *v.* Gardiner, just cited, that an affirmation at the time of the sale is proof of a warranty if shown by the evidence to be so intended; that it is not necessary to employ the word warranty in the declaration, where the declaration sufficiently discloses *aliunde* that a bare affirmation amounts to a warranty; the deceit, knowledge, etc., being sufficiently implied from surrounding circumstances; it follows, that in an action of assumpsit for breach of warranty, a bare affirmation in the declaration is always sufficient; because the action being grounded on the vendor's contract and not on his tort, it is not needful to use any word indicative of his tort, as knowledge or warranty, but only to lay words expressive of a contract, and breach thereof, as affirmation, undertaking, etc.

§ 286. This is also important to note, as owing to these principles having been overlooked, the well-known decision in Chandelor *v.* Lopus,[2] has,

[1] Douglass, 18.

[2] Cro. Jac., 4.

in the United States, been repeatedly misconceived and misconstrued.

§ 287. This was an action on the case for breach of warranty against a goldsmith who had sold a stone to the plaintiff, *affirming* it to be a bezar-stone, whereas it was not. The declaration was objected to on the ground that no *warranty* was laid in the declaration, nor any *scienter;* and all the judges (except Anderson) were of the opinion that the declaration was ill: "for the bare affirmation that it was a bezar-stone, without warranting it to be so, is no cause of action; and although he knew it to be no bezar-stone, it is not material."

§ 288. Now the meaning of this decision is very clear; that the action would not lie, because, being in *tort* for breach of *warranty* the averment of the *affirmation* was not laid according to its legal effect, which, of course, would be *warranty*, it being necessary to employ, in an action grounded on deceit, a word implying a deceit, in which case a *scienter* would be immaterial, because it is implied; and the reason that the word *affirmation* was not sufficient is obvious; for that word alone implies no deceit, but is merely evidence of it, as it might turn out in the evidence that the affirmation was not a *deceitful affirmation*, or *warranty;* otherwise, the issue would be, whether the seller did or did not make an affirmation, which, though

affording ground for an action in *assumpsit*, did not necessarily afford a cause for an action for breach of warranty in *tort;* and not whether the seller made a *deceitful* affirmation or *warranty*, for which alone the action in tort lay. The court in this case did not intend to assert that an affirmation at the time of the sale was not proof of a warranty, but decided, assuming that that was so, that in an action in tort, as in all others, words must be laid according to their legal effect; that the deceit must be averred, and not evidence of it; and that if the action be in tort, a *scienter* or a *warranty* must be averred, but neither were necessary in assumpsit. Crosse *v.* Gardiner, and Stuart *v.* Wilkins,[1] are not opposed to this principle; for in the former case, the declaration *aliunde* disclosed sufficient evidence from which deceit could be implied; and in the latter case the cause of action was not in tort. Neither case attempted to overrule Chandelor *v.* Lopus.[2]

§ 289. This decision, however, has frequently been cited as deciding that the word *warrant* must be used not only in the pleadings, but also at the formation of the contract, which is obviously an unreasonable and impossible stretch of its meaning.

§ 290. The point was noticed by the counsel for the plaintiff in error in Fraley *v.* Bispham,[3] and by

[1] *Supra.* [2] *Supra.* [3] 10 Pa. St., 320.

Depue, J., in Wolcott *v.* Mount,[1] and commented on at some length by Beasley, C. J., in that case, on appeal.[2] He said: "The only question in that case (Chandelor *v.* Lopus), as I understand it, was as to the sufficiency of the averments in the declaration. . . . The contention in the court of error, upon this record, was that enough did not here appear to charge the defendant, because it was shown neither that he *warranted* it to be a bezar-stone, nor knew it to be such. Instead of a warranty being expressly laid in the declaration, a mere affirmation as to the kind of article sold was laid, and it was this form of pleading which was adjudged to be bad. Now, an affirmation of this kind may or may not amount to a warranty, according to circumstances, and the fault of the pleading, therefore, was, that instead of a warranty, it set forth the inclusive evidence of a warranty. The pleader was bound to state the transaction according to its legal effect, and this was all that was decided. . . . But this decision has been many times cited, not as an illustration of the rule of pleading, but as an example of the insufficiency of the affirmation specified in the case to prove a contract of warranty; and this, in my opinion, is an evident misuse of the precedent, which has been introductive of confusion."

[1] 7 Vr. (N. J.), 465. [2] 9 Vr. (N. J.), 497.

§ 291. To maintain the action it is not necessary to return the goods, or even to give notice to the vendor.[1]

§ 292. Where the contract is executory in a sale of goods by description, and those delivered on examination are found not to be of the description agreed upon, the buyer may, according to many of the American cases, treat the contract as executed, retain the goods, and bring an action against the seller for what is termed a breach of warranty of identity, as in America it is not unusual to treat words of description in a contract as an implied warranty of identity, and not as a condition precedent.[2]

[1] Vincent *v.* Leland, 100 Mass. 432; Doughlass, etc., Co. *v.* Gardner, 10 Cush. (Mass.), 88; Day *v.* Pool, 52 N. Y. 416; Waring *v.* Mason, 18 Wend. (N. Y.) 425; Muller *v.* Eno, 14 N. Y. 597; Rust *v.* Eckler, 41 N. Y. 488; Horn *v.* Buck, 48 Md. 358; Polhemus *v.* Heiman, 45 Cal. 573; Thompson *v.* Botts, 8 Mo. 710; Hughes *v.* Banks, 1 McC. (S. C.) 537; Vanleer *v.* Earle, 26 Pa. St. 277; and it is not now necessary to lay or prove a *scienter;* see Vanleer *v.* Earle, *supra;* House *v.* Fort, 4 Blackf. (Ind.), 293; Ross *v.* Mather, 47 Barb. (N. Y.) 582; Chisholm *v.* Proudfoot, 15 U. C. Q. B. 203; Seigworth *v.* Leffel, 76 Pa. St. 476; Fielder *v.* Starkin, 1 H. Bl. 17; Pateshall *v.* Tranter, 3 A. & E. 103; Poulton *v.* Lattimore, 9 B. & C. 259.

[2] See *supra*, §§ 104–129, and see *infra*.

It is suggested by Mr. Corbin in his notes to Benjamin on Sales, 4th Amer. ed., at page 1158, that the New York cases are not easily reconciled on this subject with each other. Perhaps the

§ 293. With respect to the breach of warranty of title, the buyer has the usual remedies, as in other cases; that is, when the title has passed, the buyer may bring an action for breach of warranty;[1] but when the sale is executory, the implied stipulation of title may be treated as a condition precedent, and the buyer has the usual remedies, as in other executory contracts of sale.[2]

§ 294. Where the buyer retains the goods and sues on the warranty if the title turns out to be bad; it has, in some States, been decided that an eviction or disturbance in possession must be shown before the buyer has any cause of action;

difficulty arises from the fact that the distinction between the condition precedent and implied warranty, taken by Wright, J., in Reed *v.* Randall, 29 N. Y. 358, has not always been regarded by the courts in that State. See the following cases: Hargous *v.* Stone, 5 N. Y. 73; Reed *v.* Randall, 29 N. Y. 358; Boorman *v.* Jenkins, 12 Wend. (N. Y.) 566; Sprague *v.* Blake, 20 Wend. (N. Y.) 61; Muller *v.* Eno, 14 N. Y. 597; McCormick *v.* Sarson, 45 N. Y. 265; Dutchess Co. *v.* Harding, 49 N. Y. 321; Day *v.* Pool, 52 N. Y. 416; Gaylord Mfg. Co. *v.* Allen, 53 N. Y. 519; Parks *v.* Morris, 54 N. Y. 586; Gurney *v.* Atlantic R'y Co., 58 N. Y. 358; Gautier *v.* Doughlass, etc., Co., 13 Hun (N. Y.), 514; Marshuetz *v.* McGreevy, 23 Hun (N. Y.), 408; Dounce *v.* Dow, 64 N. Y. 411; McParlin *v.* Boynton, reported in 8 Hun (N. Y.), 449; affirmed in 71 N. Y., 604.

[1] See *supra*, § 274; and *infra*, §§ 294, 303, etc., 326.

[2] See *supra*, §§ 89, 224; and *infra*, §§ 311, etc., 318, 326.

while in others it is held that the warranty is broken as soon as made, if the title in fact is bad, and the buyer may bring an action before eviction takes place or is contemplated.

§ 295. In New York, in Case *v.* Hall,[1] Nelson, C. J., said: "Where, however, the vendee relies on the warranty of title, either express or implied, there must be a recovery by the real owner before an action can be maintained. This is in the nature of an eviction, and is the only evidence of the breach of the contract in analogy to the case of covenant."[2]

§ 296. In California, in Gross *v.* Kierski,[3] it was held that where goods are in possession of the vendor at the time of the sale, the Statute of Limitations upon the implied warranty of title to chattels does not begin to run until the vendee is disturbed in possession.

Wallace, J., said, *arguendo:* "In an action brought against the vendor of chattels upon an *express* warranty of title, the authorities are believed to be uniform upon the point that there is no breach in contemplation of law until the vendee's possession of the goods is in some way dis-

[1] 24 Wend. (N. Y.), 102.

[2] See, also, Vibbard *v.* Johnson, 19 John. (N. Y.) 77; Sweetman *v.* Prince, 62 Barb. (N. Y.) 256.

[3] 41 Cal., 111.

turbed by reason of the title of the true owner. No substantial difference in this respect is perceived between an express warranty of title made by a vendor upon the sale of chattels out of possession and the warranty of title implied by law upon a sale of goods in possession. . . . It is true the Court of Appeals of Kentucky hold that there is a distinction between an express warranty of title to chattels and the warranty of title implied by law. The express warranty is likened to a *covenant* to warrant and defend the title, when inserted in a deed of conveyance of lands, and is, therefore, said to be unbroken until an eviction by the true owner, under paramount title, has taken place. The implied warranty is, however, compared to a covenant of seisin, which is said to be broken, if at all, the instant that it is entered into. As a consequence, it is the settled rule in that State that the Statute of Limitations upon breach of an express warranty of title to personal property commences to run from the time when the vendee is disturbed; while in case of implied warranty it is set in motion instantly upon the sale and delivery of the goods: Payne *v.* Rodden,[1] Scott *v.* Scott,[2] Tipton *v.* Triplett,[3] Chancellor *v.* Wiggins.[4] For the distinction thus made I think that

[1] 4 Bibb (Ky.), 304.
[2] 2 Mar. (Ky.), 219.
[3] 1 Metc. (Ky.), 570.
[4] 4 B. Mon. (Ky.), 202.

no good reason can be shown. Its operation would, in many instances, deprive the purchaser of the very protection which it is the purpose of the implication to afford. Nor is it clear that the analogy supposed to exist between the covenant of seisin and the implied warranty of chattels can be maintained. . . . The doctrine of the Court of Appeals of Kentucky is believed to be unsupported either by text-writers upon the law or the adjudications of the courts of other States of the Union."

§ 297. In Illinois, in Linton *v.* Porter,[1] an action was brought upon a note given upon the purchase of a chattel. The Supreme Court of Illinois held, it was no defence that the vendor had no title while the possession of the vendee remained undisturbed by the true owner.

§ 298. In Tennessee, in Word *v.* Cavin,[2] it was held that, in an action upon the implied warranty of title, the Statute of Limitations commenced to run upon the possession of the chattel being lost, or upon a voluntary offer by the vendee to restore it to the true owner.

§ 299. In Missouri, in Dryden *v.* Kellogg,[3] the court said: "In cases of personal property the rule is well settled that the warrantee need not incur the expense of fruitless resistance against

[1] 31 Ill., 107.
[2] 1 Head (Tenn.), 507.
[3] 2 Mo. App., 92.

the paramount owner. But . . . he must show conclusively that the title to which he has surrendered was better than his own."

§ 300. In Massachusetts the rule is otherwise, and the courts hold that if a chattel be sold, to which the vendor has no title, the purchaser may maintain an action against him to recover damages therefor; and it is immaterial whether the purchaser has been deprived of possession of the chattel or not.[1]

§ 301. In Perkins *v.* Whelan,[2] Morton, J., said: "The plaintiff's cause of action is founded upon the breach of the warranty of title implied in the sale of the horse by John Whelan to him. This breach occurred at the time of the sale, and the right to sue then accrued. The case is analogous to an action for a breach of the covenants in a deed against encumbrances, where it is held that the covenant is broken as soon as the deed is delivered, and an action accrues for such breach. . . . In Grose *v.* Hennessey,[1] it was held that an action for a breach of the warranty of title in a chattel could be maintained by the buyer, although he had not been disturbed in his possession. This implies, and is consistent only with the rule, that the war-

[1] Grose *v.* Hennessey, 13 Allen (Mass.), 389.

[2] 116 Mass., 542.

ranty is broken at the time of the sale and the cause of action then accrues."

§ 302. In Pennsylvania, in Krumbhaar *v.* Birch,[1] Mercur, J., said: "Where defence is made to the payment of the purchase-money for breach of warranty of title, there should be proof of eviction, or of an involuntary loss of the possession. The warranty of title is a part of the consideration, while the vendee holds the covenant and retains possession he cannot withhold the purchase-money. The right to detain the purchase-money is in the nature of an action on the covenant. A vendee who seeks to detain by virtue of a covenant of warranty of title, in the absence of fraud, is as much bound to prove an eviction as if he was a plaintiff in an action of covenant. . . . The purchaser of personal property who takes and retains possession thereof, and uses and consumes the same, cannot afterwards prevent a recovery of the price he agreed to pay by showing he had bought the title of a third person." These remarks were scarcely more than *dicta*, and are apparently opposed to the remarks of Sharswood, J., in Flynn *v.* Allen.[2] In speaking of this subject, that eminent jurist said: "If the assignee of a bond cannot recover it from the obligee by the reason of

[1] 83 Pa. St., 428. [2] 57 Pa. St., 485.

the consideration of it having failed before the assignment of it was made, he may recover back from the assignor the money he paid for the assignment, whether he hold the guaranty or not: Kauffelt *v.* Leber.[1] Like other warranties of title, as of seisin, or right to convey, it is broken as soon as it is made, if in point of fact it is not a valid security. The assignee need not wait until it is due before bringing suit. His right of action accrues immediately: Holder *v.* Taylor;[2] Bender *v.* Fromberger;[3] Stewart *v.* West.[4] Nor is it necessary to tender a return of the security before the commencement of the action: Ritchie *v.* Summers;[5] Fielder *v.* Starkin."[6] Flynn *v.* Allen, *supra*, was not quoted by the court or counsel in Krumbhaar *v.* Birch, *supra*, nor were any of the cases which were cited therein by Mr. Justice Sharswood.

§ 303. Besides bringing an action, the buyer may also retain the goods, and, in an action for the price, give in evidence the breach of warranty in diminution of damages by way of counterclaim,[7] and if the goods prove wholly worthless,

[1] 9 W. & S. (Pa.), 93.
[2] Hob., 12.
[3] 4 Dall. (Pa.), 438.
[4] 14 Pa. St., 336.
[5] 3 Yeates (Pa.), 531.
[6] 1 H. Black. 19.
[7] Mondel *v.* Steel, 8 M. & W. 858; Basten *v.* Butter, 7 East, 479; Davis *v* Hedges, L. R. 6 Q. B. 687; Steigleman *v.* Jeffries, 1 S. & R. (Pa.) 477; Polhemus *v.* Herman, 45 Cal. 573; Perley

the buyer would probably be permitted to retain the goods, and be relieved from paying any part of the price, and that without an offer to return;[1] and in many States, to avoid circuity of action, in an action by the seller for the price, the buyer is permitted not only to offer the breach of warranty as a defence, but, in addition, to claim damages against the seller for the breach of contract.[2]

§ 304. Where, however, the action by the seller against the buyer is not on the price of the goods, but on the *security* given for them, as, for instance, a note or bill given in payment, it would seem that, according to the old English rule, the purchaser has no defence, even *pro tanto*, where the goods are warranted of a particular description, and turn out to be of an inferior description, though he may defend the action *in toto* if the consideration has totally failed, provided that he has repudiated the contract; the reason being that the instrument is in its nature new and the claim unliquidated; the remedy being, therefore, by cross

*v.* Balch, 23 Pick. (Mass.) 283; Dorr *v.* Fisher, 1 Cush. (Mass.) 271; Lilley *v.* Randall, 3 Col. 298; Croninger *v.* Paige, 48 Wisc. 229; Dailey *v.* Green, 15 Pa. St. 118, 126.

[1] See Poulton *v.* Lattimore, 9 B. & C. 259; Beecker *v.* Vrooman, 13 John. (N. Y.) 302; Vincent *v.* Leland, 100 Mass. 432.

[2] See Steigleman *v.* Jeffries, 1 S. & R. (Pa.) 477; Withers *v.* Green, 9 How. (U. S.) 227; Wentworth *v.* Dows, 117 Mass. 14.

action: 1 Chitty on Contracts, 11th Am. ed., at page 653; and in such cases it may be, that it is not necessary to show a return—that is, where the failure of consideration is total;[1] though now, in England the buyer may set up unliquidated damages by counter-claim by virtue of the recent judicature acts; see Ords. XIX. r. 3; XXII. r. 10.

§ 305. In the United States, however, it has been held that in a suit by the payee of a note given for the price of a chattel, it is competent for the maker to prove in reduction of damages, that the sale was effected by means of false representations on the part of the payee, without a return of the goods sold;[2] though how far this is the universal rule I will not undertake to say.

*b. Sale or Return of Goods.*

§ 306. In Adam *v.* Richards,[3] where a horse was sold with an express warranty, coupled with a condition to take him back if found not to conform

[1] Burton *v.* Stewart, 3 Wend. (N. Y.) 236; Perley *v.* Balch, 23 Pick. (N. Y.) 283.

[2] Harrington *v.* Stratton, 22 Pick. (Mass.) 510; Perley *v.* Balch, 23 id. 283; Burton *v.* Stewart, 3 Wend. 236; Coburn *v.* Ware, 30 Me. 203; Rasberry *v.* Moye, 23 Miss. 320; Albertson *v.* Holloway, 16 Ga. 377; 1 Chitty, *supra*, notes; Shackelton *v.* Lawrence, 65 Ill. 175; Withers *v.* Greene, 9 How. 213; Mann *v.* Smyser, 76 Ill. 365; Wentworth *v.* Dows, 117 Mass. 14.

[3] 2 H. Bl., 573.

to the warranty, it was held that the purchaser was bound to return the horse so soon as the faults were discovered.

§ 307. This decision has been considered in some parts of the United States to decide only, that the vendee will lose his remedy of rescission if not exercised within the time prescribed for the return; but not to hold that he loses the right of action on the warranty if he declines to return.

§ 308. Thus in Doughlass Axe Co. *v.* Gardner,[1] Metcalf, J., in criticizing the case of Adam *v.* Richards,[2] observed: "The marginal abstract of that case is thus: 'Though on the sale of a horse there is an express warranty by the seller that the horse is sound, free from vice, etc., yet if it is accompanied with an undertaking on the part of the seller to take the horse again and pay back the purchase-money, if on the trial he shall be found to have any of the faults mentioned in the warranty, the buyer must return the horse as soon as he discovers any of these defects, in order to maintain an action on the warranty, unless he has been induced to prolong the trial by any subsequent misrepresentation of the seller.' If by action on the warranty is here meant an action to recover damages for breach of the warranty, we cannot

[1] 10 Cush. (Mass.), 88. [2] *Supra.*

assent to the doctrine. When a seller, in addition to a warranty of property, makes a promise to take it back if it does not conform to the warranty, and we cannot hold that such superadded promise rescinds and vacates the contract of warranty, we are of opinion that in such case the buyer has, if not a double remedy, at least a choice of remedies, and may either return the property within a reasonable time, or keep it and maintain an action for breach of the warranty. And we are not convinced that the contrary was decided in Adam *v.* Richards. That case is defectively reported:" and the learned judge went on further to criticize the case.

§ 309. In Perrine *v.* Serrell,[1] it was held that, where a horse was warranted "sound and kind," and that if he did not suit, the seller would take him back, and send the buyer another, the purchaser was not compelled to call upon the seller to provide another horse, but could sue for the breach of warranty of soundness.

§ 310. But, at all events, if the agreement clearly states that the goods *must* be returned, if not conformable to the warranty within a certain

[1] 1 Vr. (N. J.), 454; see, also, McCormick *v.* Dunville, 36 Iowa, 645; Seigleworth *v.* Leffel, 76 Pa. St. 476.

time, then the remedy the buyer has is on the rescission, and not on the warranty.[1]

*c. Goods Returned: Breach of Contract.*

§ 311. Besides the remedies we have just described, which the buyer has, in the event of his retaining the goods delivered, he may also, in an executory contract of sale of an unascertained article, not inspected by the buyer, before the title has passed him, or perhaps of an ascertained article, where inspection is impossible,[2] reject the whole of the goods, if on trial or inspection they do not correspond with the articles as described or warranted by the seller at the formation of the contract, and bring an action for breach of contract against the seller, returning the goods, or notifying the seller of his intention to reject the goods with-

[1] See, also, generally, Hinchcliffe *v.* Barwick, 5 Ex. D. 177; C. A. Bonsberger *v.* Griener, 18 Iowa, 477; Head *v.* Tattersall, L. R. 7 Ex. 7; Elphick *v.* Barnes, 5 C. P. D. 321; Okell *v.* Smith, 1 Stark. 86; Lucy *v.* Mouflet, 5 H. & N. 229; Street *v.* Blay, 2 B. & Adol. 456; Mondel *v.* Steel, 8 M. & W. 858.

[2] The reader also is referred to Heyworth *v.* Hutchinson, L. R. 2 Q. B. 447; and the *dicta* of the judges in that case, which were probably directed to the case of a bargain and sale, and not of an executory contract; see, also, Benjamin on Sales, 4th Amer. ed., Corbin, 1149.

out sending them back.[1] This proposition needs no authorities in its support.[2]

§ 312. A sale by sample is, as has been remarked, for certain purposes, regarded as a sale by description, and consequently there is always a condition precedent to the buyer's acceptance of the goods sold, that he shall have the right to examine them, and reject them, if not correspondent with the sample, though ordinarily the buyer cannot reject specific, ascertained goods, if not correspondent with the warranty.

§ 313. Thus, in Lorymer *v.* Smith,[3] the vendor declined to allow the purchaser to look at the bulk of some wheat he had bought by sample, and the buyer thereupon declined to accept it. The court of King's Bench held the request had been a proper one, and the buyer was justified in rejecting the sale.

§ 314. Under this category falls, also, the condition implied in "Sales and Return," or "Sales on Trial," which has been discussed above.[4]

[1] See Grimolby *v.* Wells, L. R. 10 C. P. 391 ; explaining remarks of Lord Chelmsford in Couston *v.* Chapman, L. R. 2 Sc. App. 250.

[2] See *supra*, §§ 89, 293 ; *infra*, §§ 312, 318.

[3] 1 B. & C., 1. See Heilbutt *v.* Hickson, L. R. 7 C. P. 438 ; Grimolby *v.* Wells, L. R. 10 C. P. 978 ; Couston *v.* Chapman, L. R. 2 Sc. App. 250.

[4] See *supra*, § 306.

§ 315. The buyer must, however, return the goods, so soon as the fault is discovered, and it must be within a reasonable time; for if he retain the goods for an unreasonable time, or deal with it as his own, or use more than a reasonable amount in examining their quality, he will be taken to have accepted them.

§ 316. Thus, in Parker *v.* Palmer,[1] the buyer, after seeing fresh samples drawn from the bulk of rice he had bought, which were inferior in quality to the original sample, offered the rice for sale, and the limit of price mentioned by him not being reached, bought it in; and the court held that, as he had thus dealt with the rice, he could not afterwards reject the bulk.

§ 317. This, however, would probably not take away the right to cross action or counter claim.[2]

[1] 4 B. & Ald., 387; Sanders *v.* Jameson, 2 C. & K. 557; Chapman *v.* Morton, 11 M. & W. 534; Reed *v.* Randall, 29 N. Y. 358; Gaylord, etc., *v.* Allen, 53 N. Y. 515; Cahen *v.* Platt, 69 N. Y. 348; Wilds *v.* Smith, 2 Ont. App. 8; Lyon *v.* Bertram, 20 How. (U. S.) 149; Doane *v.* Dunham, 65 Ill. 512; Dailey *v.* Green, 15 Pa. St. 118; Heilbutt *v.* Hickson, L. R. 7 C. P. 438; Couston *v.* Chapman, L. R. 2 Sc. App. 250.

[2] See Mondel *v.* Steel, 8 M. & W. 858; Street *v.* Blay, 2 B. & Adol. 456; Day *v.* Pool, 52 N. Y. 416; Gurney *v.* Atlantic, etc., 58 N. Y. 358.

### *B. Avoidance of the Contract.*

#### *a. Rescission for Breach of Warranty.*

§ 318. The buyer has also the right, in an executory contract, where the goods are not inspected, before the title has passed, as above described, to reject the article delivered, and rescind the contract;[1] but whether in a bargain and sale he can rescind for breach of warranty, that is, where the title has passed, and the sale is absolute, is a somewhat mooted point.

§ 319. In Curtis *v.* Hannay[2] Lord Eldon is reported to have said that "he took it to be clear law that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty; . . . *or, he might return the horse and bring an action to recover the full money paid;*" and this dictum has been adopted in Starkie's Law of Evidence, Part IV. at page

[1] See *supra*, §§ 89, 224, 293, 311, 312; see, also, Vorhies *v.* Earl, 2 Hill (N. Y.), 288; Polhemus *v.* Heiman, 45 Cal. 579; Doane *v.* Dunham, 65 Ill. 512.

[2] 3 Esp., 82.

645. In Street *v.* Blay,[1] however, Curtis *v.* Hannay was virtually overruled, Lord Tenterden saying, in reference to this dictum: "It is, however, extremely difficult, indeed impossible, to reconcile this doctrine with those cases in which it has been held that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right, upon the breach of warranty, to return the article and revest the property in the vendor, and recover the price as money paid on a consideration which has failed, but must sue upon the warranty, unless there has been a condition in the contract authorizing the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of a fraud which destroys the contract altogether. . . . If these cases are rightly decided, and we think they are, and they certainly have always been acted upon, it is clear that the purchaser cannot by his own act alone, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid."

§ 320. In Thornton *v.* Wynn[2] [1827], which appears to be the earliest American case in which

[1] 2 B. & Adol., 456 [1831]; see, also, Weston *v.* Downes, 1 Doug. 23; Towers *v.* Barrett, 1 T. R. 133; Payne *v.* Whale, 7 East, 274; Emanuel *v.* Dane, 3 Camp. 299.

[2] 12 Wheat. (U. S.), 183.

the point was actually decided, it was held that in an absolute sale, the title having passed, the buyer would not be permitted to rescind for the breach of contract of warranty. The English cases were reviewed by Washington, J., who delivered the opinion, though I am not aware that Curtis *v.* Hannay[1] was cited.

§ 321. The principles of Thornton *v.* Wynn[2] have been followed in the following States: Pennsylvania,[3] New York,[4] and there are either dicta or decisions to the same effect in Vermont,[5] Connecticut,[6] Missouri,[7] Minnesota,[8] North Carolina,[9] Kentucky,[10] Georgia,[11] Texas.[12]

§ 322. In Massachusetts an opposite rule appears to prevail, and the right of rescission was

[1] 3 Esp. 82.

[2] 12 Wheat. (U. S.) 183.

[3] See, also, Lyon *v.* Bertram, 20 How. (U. S.) 149; Benjamin on Sales, 4 Amer. ed., Corbin, at page 546; Kase *v.* John, 10 Watts (Pa.) 107; Freyman *v.* Knecht, 78 Pa. St. 141.

[4] Voorhees *v.* Earl, 2 Hill (N. Y.), 288; Muller *v.* Eno, 14 N. Y. 597; Rust *v.* Eckler, 41 N. Y. 488; Day *v.* Pool, 52 N. Y. 416.

[5] West *v.* Cutting, 19 Vt. 536.

[6] Buckingham *v.* Osborne, 44 Conn. 133.

[7] Walls *v.* Gates, 6 Mo. App. 242.

[8] Knoblauch *v.* Krouschnabel, 18 Minn. 300.

[9] Lewis *v.* Rountree, 78 N. C. 323.

[10] Lightburn *v.* Cooper, 1 Dana (Ky.), 273.

[11] Samson *v.* Pennaman, 65 Ga. 698.

[12] Wright *v.* Davenport, 44 Texas, 164.

allowed in Bryant *v.* Isburgh,[1] citing Bradford *v.* Manly,[2] Perley *v.* Balch,[3] and Dorr *v.* Fisher[4] with approval. This doctrine was put by Shaw, C. J., on the ground of condition subsequent in Dorr *v.* Fisher,[4] and at page 273 he says: "A warranty is a separate, independent, collateral stipulation on the part of the vendor, with the vendee, for which the sale is the consideration, for the existence or truth of some fact relating to the thing sold. It is not strictly a condition, for it neither suspends nor defeats the completion of the sale, the vesting of the thing sold in the vendee, nor the right to the purchase-money in the vendor. And, notwithstanding such warranty, or any breach of it, the vendee may hold the goods and have a remedy for his damages by action. But, to avoid circuity of action, a warranty may be treated as a condition subsequent, at the election of the vendee, who may, upon a breach thereof, rescind the contract and recover back the amount of his purchase-money, as in case of fraud."[5]

§ 323. The Massachusetts doctrine, by decisions or dicta, is approved in the following States:

[1] 13 Gray (Mass.), 607.
[2] 13 Mass., 139.
[3] 23 Pick. (Mass.) 283.
[4] 1 Cush. (Mass.) 271.
[5] See Morse *v.* Brackett, 98 Mass. 205.

Maryland,[1] Maine,[2] Iowa,[3] Ohio,[4] Indiana,[5] Arkansas,[6] Alabama,[7] Missouri,[8] and Illinois.[9]

*b. Rescission for Fraud.*

§ 325. The question of the buyer's right of rescission for fraud, as well as the general effect of the seller's fraud on the contract of warranty, will be discussed in the following subdivision, under the general head of fraud.

## III. *Fraud.*

§ 326. As has been already stated, the universal rule in sales of personal property, in the absence of an express or an implied warranty, is *caveat emptor*. But where the seller is guilty of fraud in respect to the thing sold, the rule no longer applies, but the buyer has the choice of several remedies, in regard to his injury.

[1] Taymon *v.* Mitchell, 1 Md. Ch. 496.
[2] Marston *v.* Knight, 29 Me. 341.
[3] Jack *v.* Des Moines, etc., 53 Iowa, 399.
[4] Byers *v.* Chapin, 28 Ohio St. 300.
[5] Dill *v.* O'Ferrell, 45 Ind. 268.
[6] Plant *v.* Condit, 22 Ark. 458.
[7] Penn *v.* Johnston, 59 Alab. 203.
[8] Warder *v.* Fisher, 48 Wisc. 338.
[9] Prickett *v.* McFadden, 8 Ill. App. 197; see ib. 529.

§ 327. What actually constitutes fraud is not easy to define, and perhaps the word may be best understood by looking at its legal effect on the contract; and it may then be defined to be some ground for setting aside the contract upon the discovery, and, in consequence, of an intentional and successful artifice causing an injury, practised by one of the parties without the knowledge of the other, and which was essential to the formation of the contract. . . . In order to render fraud an efficacious means of avoiding the contract of sale, it is obvious that the party must have been deceived, and that the party deceiving must have done so intentionally; and that there must be evidence of injury resulting from the fraud, otherwise it is of no avail.[1]

§ 328. In Pasley *v.* Freeman,[2] it was held that a false affirmation made by the defendant, with intent to defraud, whereby the plaintiff suffered damage, was the ground of an action on the case for deceit; and the defendant need not be benefited by the deceit. Buller, J., remarked: "Fraud without damage, or damage without fraud, gives no cause of action; but where these two concur, an action lies. . . . An action cannot be supported for telling a bare, naked lie: but that I define to be saying a thing which is false, knowing or not knowing it to

[1] Biddle on Stock Brokers, 288.

[2] 3 T. R., 51.

be so, and without any design to injure, cheat, or deceive another person. Every deceit comprehends a lie; but a deceit is more than a lie, on account of the view with which it is practised, its being coupled with some dealing, and the injury which it is calculated to occasion, and does occasion, to another person."

§ 329. The question of fraud was discussed at some length by Story, J., in Hough *v.* Richardson,[1] and at page 690, he said: "And here it is important to state that both facts must concur; there must be false and material representations, and the purchaser must have purchased upon the faith and credit of such representations. It is not necessary that he should have solely relied on these representations. It is sufficient if they constituted a part of the *res gestæ*, upon which he relied and without which the purchase would not have been made. There is another consideration applicable to the circumstances of the present case, which is fully sustained by the case of Atwood *v.* Small, in the House of Lords,[2] and which, perhaps, cannot be more briefly expressed than it has been, with a slight addition, in the marginal note of the reporters. If, upon a treaty for the sale of property, the vendor makes representations (touching the nature and character and value of that pro-

[1] 3 Story (U. S.), 659.

[2] 6 Cl. & Fin., 232.

perty) which he knows to be false, the falsehood of which the purchaser has no means of knowing, but he relies on them, a court of equity will rescind a contract so entered into, although it may not contain the misrepresentations. But it will not rescind without the clearest proof of the fraudulent misrepresentations, and that they were made under such circumstances as show that the contract was based on them. But if a purchaser, choosing to judge for himself, does not avail himself of the knowledge open to him or to his agents, he cannot be heard to say that he was deceived by the vendor's misrepresentations, the rule being *caveat emptor*, and the knowledge of his agents being as binding upon him as his own knowledge. Now, this doctrine is, in both its aspects, just as true as to gross misrepresentations, made by mistake, going to the essence of the bargain, as it is to the misrepresentation founded in fraud. I do not say, morally, but in construction of law. If the purchaser relies on them and is deceived, he does not buy what he intended, and he is misled to do what he would not otherwise have done. But then, on the other hand, in cases of mistake, the bargain must have been made in strict faith and reliance upon such gross misrepresentations; and if the purchaser has acted upon his own judgment, uninfluenced by such misrepresentations, and has

within his immediate reach full means of knowledge, and has declined to use those means, then he has no right to complain of his bargain. And here again the proof should be clear that there has been gross misrepresentations, and that the purchaser has been seduced into the bargain by them." The reader is also referred to the cases in the notes for illustrations, and the language the courts have used upon the subject.[1]

§ 330. In Ellis *v.* Andrews,[2] however, it was held that a false statement which the seller knowingly made with reference to the *value* of an article for the purpose of obtaining a *higher price*, would not sustain an action for fraud, by the purchaser who relied on it, on the ground that there is a broad distinction between a false affirmation of quality, or title, or soundness, and mere value, as in respect to the latter the purchaser must always be his own judge.[3]

[1] Hadley *v.* Clinton, etc., Co., 13 Ohio St. 502; Stroud *v.* Pierce, 6 Allen (Mass.), 413; Stone *v.* Denny, 4 Metc. (Mass.), 151; Osgood *v.* Lewis, 2 H. & G. (Md.), 495; Blythe *v.* Speake, 23 Texas, 430; Patrick *v.* Leach, 8 Neb. 530; Larey *v.* Taliaferro, 57 Ga. 443; Bank *v.* Thayer, 7 Fed. Rep. 622; Weimer *v.* Clement, 37 Pa. St. 147; Lord *v.* Grow, 39 Id. 88.

[2] 56 N. Y., 83.

[3] See, also, Gordon *v.* Butler, 105 U. S. 553; Homer *v.* Perkins, 124 Mass. 431; Buschman *v.* Codd, 52 Md. 202; Schramm *v.* O'Conner, 98 Ill. 539; Cagney *v.* Cuson, 77 Ind. 494.

§ 331. Where the seller has been guilty of fraud in the sale, the buyer has several remedies. He may refuse to receive the goods, or offer to return them when received, and rescind the contract because of the deceit, and if he has paid the price, recover it back.[1] He may also retain the goods, and in an action for the price avoid the plaintiff's right to recover by proof of the deceit and worthless character of the goods; or if the goods are not wholly worthless, he may show a diminution in their value in mitigation of damages.[2] Or, finally, he may retain the goods and bring an action on the deceit.[3] And it has been decided that, though ordinary parol evidence is not admissible to vary a written contract, yet where there is an allegation of fraud, such evidence will not necessarily be excluded, when it is offered to prove that the written evidence was fraudulently obtained.[4] It is hardly

[1] Freyman *v.* Knecht, 78 Pa. St. 141; Cozzins *v.* Whitaker, 3 S. & P. (Ala.), 322; Boorman *et al. v.* Jenkins, 12 Wend. (N. Y.), 566; Jack *et al. v.* R. R. Co., 53 Iowa, 399; Blythe *v.* Speake, 23 Texas, 430; Stroud *v.* Pierce, 6 Allen (Mass.), 413; Kimball *v.* Cunningham, 4 Mass. 502.

[2] Becker *v.* Vrooman, 13 John. (N. Y.) 302.

[3] Loomis *v.* Cromwell, 8 Law Rep. 546; Cozzins *v.* Whitaker, 3 S. & P. (Ala.) 322; Blythe *v.* Speake, 23 Texas, 430; McFarland *v.* Newman, 9 Watts (Pa.), 55.

[4] Cozzins *v.* Whitaker, 3 S. & P. (Ala.) 322.

necessary to add that where the buyer rescinds and returns the goods for the fraud of the seller, he must do so within a reasonable time.[1]

§ 332. Where the buyer maintains a defence to an action for the price, on the ground of fraud, the same facts must be proved as would be necessary to maintain an action for damages for deceit.[2]

## Section II. Measure of Damage.

§ 333. The measure of damage where the goods have not been returned, for a breach of warranty, is the difference between the actual value of the article sold, and the value of the article, had it conformed to the warranty;[3] and it has been held that the price paid is strong evidence of what the article would have been worth if sound.[4] Where

[1] Draper *v.* Sweet, 66 (Barb.) N. Y. 145; Horn *v.* Buck, 48 Md. 358.

[2] See King *v.* Eagle Mills, 10 Allen (Mass.), 548; Bond *v.* Clark, 35 Vt. 577.

[3] Dingle *v.* Hare, 7 C. B. N. S. 145; Lewis *v.* Peake, 7 Taunt. 153; Randall *v.* Roper, E. B. & E. 84; Jones *v.* Just, L. R. 3 Q. B. 197; Tuttle *v.* Brown, 4 Gray (Mass.), 457; Loomis *v.* Cromwell, 8 Law Rep. 546; Pinney *v.* Andrus, 41 Vt. 632; Freyman *v.* Knecht, 78 Pa. St. 141; Thornton *v.* Thompson, 4 Grat. (Va.) 121; Moulton *v.* Scruton, 39 Me. 287; Cary *v.* Gruman, 4 Hill (N. Y.), 625; Reggio *v.* Braggiotti, 7 Cush. (Mass.) 166; Cothers *v.* Keever, 4 Pa. St. 168; Tatum *v.* Mohr, 21 Ark. 351.

[4] Cary *v.* Gruman, 4 Hill (N. Y.) 625; Thornton *v.* Thompson, 4 Grat. (Va.) 121; Reggio *v.* Braggiotti; 7 Cush. (Mass.), 166.

the goods have been returned, the measure of damage would be the whole price.[1] So also where the goods prove utterly worthless the same rule would probably apply.[2] Where the seller sues for the price, the buyer may, as has been stated, prove the breach of warranty in reduction of damages.[3]

§ 334. Where the sale is fraudulent, aggravated damages may be recovered by reason of the buyer's wilful false representations.[4]

§ 335. And, in certain cases, where there is no fraud, the buyer will be allowed to recover damages for accidents or loss occasioned by the use of the goods sold, the use being such as both parties naturally contemplated.[5]

[1] Kimball *v.* Cunningham, 4 Mass. 502; Conner *v.* Henderson, 15 Mass. 319.

[2] See Williamson *v.* Canaday, 3 Ired. (N. C.) 349; Conner *v.* Henderson, *supra.*

[3] Harrington *v.* Stratton, 22 Pick. (Mass.), 510; Mixer *v.* Coburn, 11 Metc. (Mass.) 561; Dorr *v.* Fisher, 1 Cush. (Mass.) 271.

[4] Mullett *v.* Mason, L. R. 1 C. P. 559; Marsh *v.* Webber, 16 Minn. 418; Herring *v.* Skaggs, 62 Ala. 180; Jeffrey *v.* Bigelow, 13 Wend. (N. Y.) 518.

[5] See, generally, Hadley *v.* Baxendale, 9 Exch. 341; Heilbut *v.* Hickson, L. R. 7 C. P. 43; Wolcott *v.* Mount, 9 Vr. (N. J.) 497; Randall *v.* Newsom, 2 Q. B. D. 102, C. A.; Hill *v.* Balls, 2 H. & N. 299; Smith *v.* Green, 1 C. P. D. 92; George *v.* Skivington, L. R. 5 Ex. 1; doubted in Heaven *v.* Pender, 9 Q. B. D. 302; which, however, was reversed on appeal in 11 Q. B. D. 503, C. A.; Erie Iron Works *v.* Barber, etc., Co., 13 W. N. C. (Phila.) 492.

§ 336. The question of damages, more particularly in relation to profits, was discussed at considerable length by the court in Wolcott *v.* Mount.[1] In that case, seed was bought and sown on the faith of the seller's statement, made in good faith, that it was of a certain kind, the particular kind not being ascertainable on inspection, and the seller knew the business of the buyer. The seed turning out to be of another kind, it was held there might be inferred a breach of warranty as to kind; and with respect to the measure of damage the court, on appeal, said: "The rule applied in the court below made the plaintiff whole, as he was allowed to recover the difference between the value of the crop produced and the crop which would have been produced if the seed had been answerable to the warranty. This embraces profits, and the contention was that profits are too remote and uncertain to constitute an ingredient in the recompense which the law gives in a breach of contract. But this argument comprises a latitudinarian and incorrect statement of the legal rule.

Profits sometimes are not, in a legal point of view, either remote or uncertain; where the situation of the parties is such that, supposing their attention to have been directed to the contingency, they must have perceived, at the time of the making of the contract, that its breach would probably result in the loss of definite profits, such profits being of

an ascertainable nature, the compensation which the law affords to the injured party will embrace these profits. The leading case on this subject, and one which was approved in this court in Benninger *v.* Crater,[1] is that of Hadley *v.* Baxendale.[2] The action was for the non-performance of a contract, and the rule is thus defined by the court: "We think the proper rule in such a case as the present is this: where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect to such breach of contract, should be either such as may fairly and be substantially considered as arising naturally; *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the especial circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract, under these special circumstances, so known and communicated."

[1] 4 Vr. (N. J.), 513. [2] 9 Exch., 341.

The rule thus stated has been approved of and followed in a numerous series of decisions by both the English and American courts, as is abundantly shown by Mr. Sedgwick in his valuable work on Damages, page 79 (sixth edition). The present case falls clearly within the scope of this principle. The defendant, at the time of the sale, was possessed of all the facts; he knew the business of the plaintiff, and the use to be made of the thing sold; he was in a situation to foresee, with entire certainty, the loss that would fall upon the plaintiff, if the warranty should be broken, nor are the gains which have been lost subject to any uncertainty. The seed sold was planted, and came to maturity; the seed stipulated for would have done the same, only the value of the product would have been, to a definite amount, greater. In such an injury, there is nothing speculative or contingent. There are a number of authorities which sanction the recovery of profits of a much more uncertain character than these," and the learned judge referred to the following cases in the notes.[1]

[1] Davis *v.* Talcott, 14 Barb. (N. Y.), 611; Griffen *v.* Colver, 16 N. Y. 489; Borries *v.* Hutchinson, 18 C. B. (N. S.) 445; Messmore *v.* N. Y. Shot and Lead Co., 40 N. Y. 422. See, also, Froreich *v.* Gammon, 28 Minn. 476; Marsh *v.* Webber, 16 Minn. 418; Fessler *v.* Love, 48 Pa. St. 407; Hammer *v.* Schoenfelder, 47 Wisc. 455; Nye *v.* Iowa City, etc., 51 Iowa, 129; McHose *v.* Fulmer, 73 Pa. St. 365.

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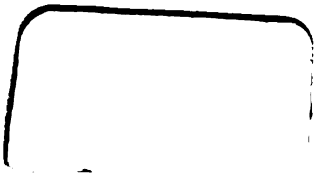
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